(1)

No. 89-1158-CFX
Status: GRANTED

Docketed:
January 8, 1990

Title: Mercedel W. Miles, Individually and as Administratrix of the Succession of Ludwick Adam Torregano, Petitioner
v.
Apex Marine Corporation, et al.

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Hardin,Allain F.

Counsel for respondent: Gelpi,Gerard T., Robein Jr.,Louis L., Coleman III,Randall C.

NOTE: Ck rec'd 0124 Counsel states Melrose not party-ltr coming

Entry	Date	Note	Proceedings and Orders
1	Jan 8 1990	G	Petition for writ of certiorari filed.
2	Feb 2 1990		Brief of respondents Apex Marine, et al. in opposition filed.
3	Feb 7 1990		DISTRIBUTED. February 23, 1990
4	Feb 26 1990		Petition GRANTED.
			**********
6	Apr 9 1990		Order extending time to file brief of petitioner on the merits until April 27, 1990.
7	Apr 27 1990		Brief of petitioner Mercedel W. Miles, etc. filed.
8	Apr 27 1990		Joint appendix filed.
10	May 7 1990		Order extending time to file brief of respondent on the merits until June 19, 1990.
11	Jun 19 1990		Brief of respondents Apex Marine, et al. filed.
12	Jul 2 1990		CIRCULATED.
13	Jul 11 1990	G	Application (A90-32) to extend the time to file a reply brief from July 19, 1990 to August 3, 1990, submitted to Justice White.
14	Jul 16 1990		Application (A90-32) granted by Justice White extending the time to file until August 3, 1990.
15	Jul 23 1990		SET FOR ARGUMENT WEDNESDAY, OCTOBER 3, 1990. (3RD CASE)
16	Jul 26 1990	D	Application (A90-76) by Mercedel W. Miles to file a in excess of page limits, submitted to Justice White.
17	Jul 30 1990		Application (A90-76) denied by Justice White.
18	Aug 3 1990	X	Reply brief of petitioner Mercedel Miles filed.
19	Aug 20 1990		Record filed.
		*	Certified record, 1 box, received.
20	Oct 3 1990		ARGUED.

1PP

NO. 89-1158

In the
Supreme Court of the United States

OCTOBER TERM, 1989

MERCEDEL W. MILES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE SUCCESSION OF LUDWICK ADAM TORREGANO
Petitioner

VERSUS

CLIFFORD A. MELROSE
Defendant

APEX MARINE CORPORATION, WESTCHESTER MARINE SHIPPING COMPANY, INC., ARCHON MARINE COMPANY AND AERON MARINE COMPANY
Defendants-respondents

SEAFARERS INTERNATIONAL UNION, ATLANTIC, GULF, LAKES, AND INLAND WATERS DISTRICT, AFL-CIO
Defendant-Third Party

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1) Whether an estate, under a general maritime wrongful death survival claim, is entitled to the decedent's future economic loss?

2) Whether the parents of a deceased seaman must establish financial dependency before a claim under the general maritime law can be asserted for loss of society?

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PETITIION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Petitioner, Mercedel W. Miles, individually and as administratrix of the succession of Ludwick Adam Torregano, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 11, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 882 F. 2d 976.

JURISDICTION

The judgment of a panel of the United States Court of Appeals for the Fifth Circuit was entered on September 11, 1989. A timely petition for rehearing was denied on October 11, 1989, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE AND FACTS

On July 18, 1984, Ludwick A. Torregano, a seaman, was stabbed to death on board the vessel, ARCHON, while it was moored in the State of Washington. The decedent had been stabbed 62 times by a fellow crew member. Mercedel W. Miles, mother of the decedent, and administratrix of his estate, brought an action against the vessel owner, charterer, and operator for negligence under the Jones Act, 46 U.S.C. § 688, and for unseaworthiness under the general maritime law.

In the trial court the jury found for defendants on the unseaworthiness claim and for the mother on the Jones Act negligence claim. The mother was found *not* to be financially dependent upon her son. Additionally, the trial judge rejected Miles' claim for the estate's economic loss and the father's claim for loss of society, since there was no evidence that he was financially dependent upon his son.

An appeal was taken and a decision rendered by the Court of Appeals, Fifth Circuit on September 11, 1989

holding the following: (1) As a matter of law, the offending crew member failed to measure up to the standard of his calling and thus rendered the vessel unseaworthy; (2) The evidence at trial did not establish any contributory negligence on the part of the decedent as found by the jury; (3) The general maritime law does not permit a survival action for a decedent's future wage loss despite a direct contradictory holding of the Court of Appeals, Ninth Circuit in *Evich v. Morris*, 819 F. 2nd 256 (9th Cir. 1987) and (4) In a general maritime wrongful death action parents cannot recover damages for their son's loss of society even when he dies without a spouse or child, unless they can show financial dependency. Contra, *Cook v. Ross Island Sand and Gravel Company*, 626 F. 2nd 746 (9th Cir. 1980).

EXISTENCE OF JURISDICTION IN THE TRIAL COURT

The District Court for the Eastern District of Louisiana had jurisdiction over this claim under 46 U.S.C. §688 (Jones Act) and pursuant to the Court's admiralty jurisdiction.

REASONS FOR GRANTING THE WRIT

1. THE OPINION OF THE FIFTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE NINTH CIRCUIT IN THE GENERAL MARITIME LAW, AN AREA WHERE THIS COURT HAS MANDATED UNIFORMITY OF DECISIONS.

There now exists a direct conflict between the Fifth Circuit and the Ninth Circuit in the Admiralty jurisdiction. In the Ninth Circuit a Seaman's Estate, where there are no dependents, is entitled to the decedent's future economic loss. *Evich v. Morris*, 819 F. 2d 256 (9th Cir. 1987), cert. denied, 108 S. Ct. 261 (*Evich* II) contra to *Miles v. Melrose*,

882 F. 2d 976 (5th Cir. 1989) at 985-987.

In *Evich v. Connolly,* 759 F. 2d 1432 (9th Cir. 1985). (*Evich* I), non-dependent brothers of a deceased seaman brought suit as representatives of their brother's estate. The brothers sought to recover pursuant to the Jones Act (46 U.S.C. §688) and under the general maritime wrongful death action as recognized in *Moragne v. State Marine Lines, Inc.,* 398 U. S. 375, 90 S. Ct. 1772 (1970). The court held that the Jones Act, following the Federal Employees Liability Act (45 U.S.C. §51 et seq.), precluded the brothers' recovery as did the general maritime wrongful death action due to their non-dependency. "Recovery for maritime wrongful death would require [the decedent's] brothers to be dependent relatives." *Evich,* I, supra at 1433. However, the court did remand the case with the instruction that the non-dependent brothers could maintain a survival action under the general maritime law.

On remand, the District Court held in favor of the brothers. The Ninth Circuit in *Evich II,* 819 F. 2d at 258 noting that "the recoverability of future economic loss in a post-*Moragne* survival action has not been addressed by a circuit court," held such recovery was allowed. The court reasoned as follows:

> While the majority of states do not allow future economic loss to be recovered in survival actions, and the Jones Act provides for no such recovery, we find recovery here better becomes the humane and liberal character of proceedings in admiralty; *Moragne,* 398 U. S. at 387, 90 S. Ct. at 1780 (Citations omitted) and prevents the anomaly of rewarding a petitioner for killing his victim rather than injuring him, see id. at 395, 90 S. Ct. at 1784. Most states and the Jones Act allow these damages to be recovered in the form of loss of

> support when wrongful death beneficiaries exist. Where, as here, those beneficiaries do not exist, potential problems with double recovery do not exist. Under these circumstances, the decedent's Estate should be compensated for loss of future earnings.

In *Miles v. Melrose* the victim's father and mother are in the same position as the brothers in *Evich.* Neither one was held to be dependent upon their son or benefited from his support. The jury specifically rejected petitioner's argument that she was a dependent. The jury apparently believed that any contributions made to the mother were insignificant and did not rise to the level of dependency. The "humane and liberal character" of admiralty proceedings and most importantly the uniformity required in the admiralty jurisdiction as recognized in *Moragne,* supra, at 387 and 401, 90 S. Ct. at 1780 and 1788 compels a review of the holding of the Fifth Circuit.

It truly would be an anomaly that non-dependent siblings are entitled to all future economic losses, while non-dependent parents are limited solely to what little damages they could show for loss of services and monetary gifts received from their child. The gravaman of the *Evich II* holding is that where the defendant is not liable to a dependent for the economic losses sustained, then the Estate is entitled to those losses.

The Fifth Circuit in its decision cited *Neal v. Barisich, Inc.* 707 F. Supp. 862 (E.D. La. 1989), a case involving the drowning of a seaman after a vessel collision. Since no one saw the seaman drown and no one could testify to any pain and suffering before death the Court dismissed this element of the claim, as well as any loss of society claim because the parents were not dependent on their son. Only a *de minimis* claim for funeral expenses remained.

Evich II addressed such a situation by allowing the Estate's recovery for economic losses because it "better becomes the humane and liberal character of proceedings in admiralty. . . and prevents the anomaly of rewarding (a ship-owner) for killing his victim rather than injuring him." *Evich*, supra, 819 F. 2nd at 258.

Ironically, the accident sued upon in this case occurred in the Ninth Circuit and could have been brought in that jurisdiction. Petitioner believing in the consistency of the admiralty law brought the action in the Fifth Circuit. If this inconsistency is allowed to stand then "the constitutionally based principal that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country" would be defeated. *Moragne*, supra at 402, 90 S. Ct. at 788. Forum shopping is a distinct possibility, especially in view of the liberal venue provisions under the Jones Act.

NON DEPENDENCY AND LOSS OF SOCIETY

Petitioner seeks review by this Court of the Fifth Circuit's Opinion denying recovery of loss of society damages under the general maritime law to the parents of the decedent, based upon non-dependency.

As this Court well knows, *Moragne v. States Marine Lines, Inc.*, 398 U. S. 375, 90 S. Ct. 1772, 26 L. Ed. 339 (1977), established a wrongful death cause of action within the maritime law. The purpose of this ruling was to remove the varying state wrongful death actions from navigable waters, thereby promoting the policy of uniformity in admiralty. Another policy consideration within *Moragne* was a humanitarian concern for those killed within the admiralty jurisdiction. The Court then left open the question of recoverable damages and classes of beneficiaries. The Court's rationale for leaving these areas open was that the

lower courts could flesh out the damages allowed in *Moragne*, supra, at 406-408, 90 S. Ct. at 1790-1792.

The Death on the High Seas Act (DOHSA), 46 U.S.C. §761-768 (1982), limits recovery to pecuniary damages and does not apply to a death occurring, as here, in territorial waters. The Jones Act, 46 U.S.C. §688 (1982), is also limited to pecuniary damages, and does not provide recovery for loss of society. *Ivy v. Security Barge Lines, Inc.*, 606 F. 2d 524 (5th Cir. 1979) (*En Banc*), Cert. denied, 448 U. S. 912 (1980).

This Honorable Court in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S. Ct. 806 (1974), held that the wrongful death remedy included non pecuniary damages for loss of society. The Court in *Gaudet*, referred to the claimants who would benefit from a loss of society claim as "dependents." *Gaudet*, supra at 583-593, 94 S. Ct. 814-818. Petitioner respectfully submits that *Gaudet* stands for the principle that family members, as here, parents, are entitled to this element of damages. (See footnote No. 4, *Sistrunk v. Circle Bar Drilling Co.*, 770 F. 2d 455 (5th Cir. 1985), where the use of the term "dependent" was seen as not being "dispositive" on this issue).

In *Gaudet* this Court defined the term "society" as embracing "a broad range of mutual benefits, each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort and protection" *Gaudet*, supra, at 585 and 94 S. Ct. at 815. Certainly, a parent/child relationship falls within this definition.

The Ninth Circuit, another active admiralty circuit, in *Cook v. Ross Island Sand and Gravel Company*, 626 F. 2d 746 (9th Cir. 1980) had before it a claim for the death of

a seaman who was survived by a mother and other family members. The jury awarded damages for the decedent's pain and suffering prior to death and for "deprivation of (decedent's) comfort, care, aid, and society" (i.e. loss of society). The jury awarded nothing for the loss of support to the decedent's mother. This was of no concern to the reviewing court. "Based on the allegation of unseaworthiness, plaintiff was entitled to recover damages for the loss of the decedent's society, pursuant to the principle of general maritime law set forth in *Moragne and Gaudet.*" 626 F. 2d 746 at 753 citing *Moragne* supra, and *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 94 S. Ct. 806 (1974). The lower Court's ruling adverse to petitioner has created a conflict with the Ninth Circuit's result in *Cook,* supra, where dependency, even post *Gaudet,* was not the determining factor in awarding damages for loss of society.

As the law now stands in the Fifth Circuit, financial dependents have a claim for a deceased seaman's loss of society, while non dependent blood relatives (parents, major children), whose loss of society claim is readily apparent, have no claim. A seaman's mother-in-law, step children, or possibly ex-wives would have a loss of society claim as long as financial dependency could be established, but his non-dependent parents or children would be foreclosed. Additionally, trial courts will have to wrestle with who are "dependents" and who are not. See broad definition as set forth in *Matter of P & E Boat Rentals, Inc.,* 872 F. 2d 642 (5th Cir. 1989) at 649.

The financial dependent class established by the Fifth Circuit in the instant case is not a readily "determinable class of beneficiaries." Miles, supra, at 989. Contradictory verdicts as to who is and who is not a "dependent" is a certainty. When compared to a class of beneficiaries based on blood relationship the Fifth Circuit's position is untenable.

The Fifth Circuit did not lack legislative guidance in determining beneficiaries. Congress in the Jones Act established a classification. 46 U.S.C. §688 applying 45 U.S.C. §51 (FELA). The ranking "in case of the death" of a seaman includes first the "surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin *dependent* upon such employee." (emphasis supplied) The Jones Act was specifically written by Congress to cover seamen. The dependency line was drawn after parents. The Fifth Circuit, instead of looking to this legislation to establish a class of beneficiaries for a loss of society claim, relied upon this Court's generic usage of the term "dependent" in *Gaudet,* supra.

Petitioner respectfully submits that under *Moragne's* twin policy considerations and *Gaudet's* loss of society definition, non-dependent parents should be allowed to recover damages for loss of society, when the death occurs in territorial waters, and there are no surviving children or spouse. If there is to be any efficacy to the jurisprudential requirement that admiralty law must be consistent throughout the United States, review of the Fifth Circuit's opinion in this instance is required.

CONCLUSION

Conflicts in an area of the law requiring uniformity must be addressed. An estate of a deceased seaman, with no dependents, has a claim in the Ninth Circuit for all economic losses in a survival action. That same estate in the Fifth Circuit is denied that recovery. Moreover, non-dependent parents in the Ninth Circuit have a loss of society claim, while in the Fifth Circuit they do not. These issues are simple and direct. Only this Honorable Court has the authority to make the federal admiralty law "coextensive

with, and operating uniformly in, the whole country." *Moragne v. States Marine Lines, Inc.*, supra at 402, citing *The Lottawanna*, 21 Wall. 558, 575, 22 L. Ed. 654 (1875). Petitioners respectfully prays that the writs be granted.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he had this 5th day of January, 1990 mailed a copy of the foregoing pleading to the attorneys of record for all other parties in this action by placing same properly addressed in the U. S. Mail with sufficient postage to insure delivery.

ALLAIN F. HARDIN

APPENDIX A

Mercedel W. MILES, Individually and as Administratrix of the Succession of Ludwick Adam Torregano, Plaintiff-Appellant, Cross-Appellee.

v.

Clifford A. MELROSE, et al.,
Defendants,

Apex Marine Cor. Westchester Marine Shipping Co. Inc., and Archon Marine Co. Defendants-Third Party Plaintiffs-Appellees, Cross-Appellants.

AERON MARINE COMPANY,
Defendant-Appellee,

SEAFARERS INTERNATIONAL UNION, ATLANTIC, GULF, LAKES, AND INLAND WATERS DISTRICT, AFL—CIO, Defendant-Third Party Defendant-Appellee.

No. 88-3325

United States Court of Appeals,
Fifth Circuit.

Sept. 11, 1989.

Mother of steward's assistant, who was stabbed at least 62 times by crew member, brought action against vessel owner, charterer, and operator for negligence under the Jones Act and for unseaworthiness under general maritime law. Owner, charterer, and operator sought indemnity from union, whose hiring hall had referred crew member to vessel, for its failure to warn of crew member's

violent propensities. The United States District Court for the Eastern District of Louisiana, Frederick J.R. Heebe, Chief Judge, dismissed action against union for failure to state claim and jury found for defendants on unseaworthiness claim and for mother on the Jones Act claim. Appeal was taken. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) as a matter of law, crew member failed to measure up to standard of his calling and rendered vessel unseaworthy; (2) evidence that crew member might have had cut on his arm, without more, was insufficient to support jury finding that steward's assistant was 7% contributorily negligent; (3) general maritime law does not permit survival action for deceased's lost future wages; and (4) in general maritime wrongful death action nondependent parents may not recover for loss of society whether or not their deceased children were survived by spouse or child.

Affirmed in part, reversed in part and remanded.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before RUBIN, POLITZ and JOHNSON, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

A mother seeks to recover for the death of her son, a steward's assistant on the defendants' vessel, who was stabbed to death by another crewmember. She contends she is entitled to damages for negligency under the Jones Act[1] and for unseaworthiness under the general maritime law. The defendants seek indemnity from the union, whose hiring hall had referred the assailant to the vessel, for its

[1] 46 U.S.C.App. § 688.

failure to warn the shipowner of the assailant's violent propensities. The district court dismissed the suit against the union for failure to state a claim. The jury found for the defendants on the unseaworthiness claim and for the plaintiff on the Jones Act claim.

Finding that the plaintiff has demonstrated unseaworthiness of the vessel as a matter of law, we reverse. We affirm the judgment finding the defendant neglignet under the Jones Act, but find a complete absence of probative facts to support the jury's verdict that the victim contributed to his death, and therefore reverse the judgment on contributory negligence. In affirming the district court's determinations on the damages issues, we hold that under the general maritime law a seaman's estate may not recover for lost future earnings and nondependent parents may not recover for loss of society, even if the seaman was not survived by spouse or child. Finally, we reverse the dismissal of the duty-to-warn claim against the union and remand for its factual development.

I

In June 1984, Ludwick Torregano, a twenty-four year old seaman, was employed as a steward's assistant on board the vessel M/V ARCHON on its maiden voyage from Korea to Portland, Oregon. The vessel was owned by the Aeron Marine Company, bare-boat chartered to Archon Marine Corporation, and operated by Apex Marine Corporation and Westchester Marine Shipping Company, Inc. (collectively "the defendants" or "Apex"). The seamen were hired pursuant to a collective bargaining agreement between Apex and the Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, AFL/CIO ("the union").

Torregano was the lowest-ranking member in a three-person galley department, along with James Jackson, the chief steward/baker, and the chief cook, who left the vessel in Portland and was replaced by Clifford Melrose on July 5. Joseph A. Acquarone, the captain of the vessel, testified that soon after Melrose signed on he expressed his dissatisfaction with the working conditions aboard the vessel and repeatedly asked to be released. On July 18 at 5:20 in the afternoon, the captain told Melrose that he had been replaced and would be put off at the next port of call. Jackson stated that around 6:30 that same day, Melrose provoked an argument with him, in which Melrose accused him of being a weak steward, being too permissive with Torregano, and complained about Torregano's and Jackson's work. Jackson thought Melrose was hostile, argumentative, angry, and under the influence of alcohol.

Less than a hour later, Jackson went to Torregano's room and found him on the floor lying in a pool of blood. Blood was spattered on the walls and furniture. Jackson went to inform the Captain that Torregano had been killed, and both men returned to the room. Outside in the hallway, Jackson saw Melrose standing naked and wet, with a blood-stained towel wrapped around his arm.

The corner's report established that Torregano had been stabbed or cut at least 62 times and had died of stab wounds to the chest and heart. Tests showed a negligible amount of alcohol in his system and no trace of drugs. The night of the murder, Melrose had a .19gm% level of blood alcohol. A jury in Clark County, Washington, convicted Melrose of second degree murder.

Mercedel Miles, Torregano's mother and administratrix of his estate, sued the defendants under the Jones Act and the general maritime law. She also sued

Melrose, but he was outside the jurisdiction of the district court and could not be served. Miles amended her complaint to add a claim against the union and the defendants filed a third party complaint against the union. The district court dismissed those actions for failure to state a claim. Joseph O. Torregano, the victim's father, sued the defendants for loss of society under the general maritime law.

At the close of the plainiff's case at trial, the court granted the defendants' motion to strike the claim for punitive damages and the claim of Joseph O. Torregano for loss of society. At the end of defendants' case, the court denied plaintiffs' motion for a directed verdict on the unseaworthiness and Jones Act negligence claims.

The jury found that (1) the defendants were negligent and Torregano was 7% contributorily negligent in causing Torregano's death; (2) the M/V ARCHON was not unseaworthy; (3) the estate should be compensated $140,000 for the pain and suffering of Torregano prior to his death; (4) Miles should be compensated $7,800 for the loss of support and services of her son; (5) Joseph Torregano is not entitled to recover damages for his loss of services from his son; and (6) Miles was not financially dependent upon Torregano and accordingly not entitled to damages for loss of society. The court denied both parties motions for judgment notwithstanding the verdict.

II

[1-5] Miles contends that the district court should have entered a judgment that the vessel was unseaworthy as a matter of law notwithstanding the jury's contrary verdict. A ship is unseaworthy unless it and all of its appurtenances and crew are reasonably fit and safe for their

intended purpose.[2] The shipowner has an absolute duty to provide the members of his crew with such a seaworthy vessel, an obligation not dependent on fault.[3] Just as a dangerous mast, a defective line, or a damaged hull may render a vessel unseaworthy, so may a seaman who is not reasonably fit.[4] To establish such unseaworthiness, a plainfiff must prove that the crewmember was not "equal in disposition and seamanship to the ordinary men in the calling."[5] Under this standard a crewmember who participates in an "ordinary sailors' brawl" is not per se unfit;[6] the rigors of work at sea for long periods of time in the close confines of a vessel may lead not only to quarrels but to physical challenges. As Judge Learned Hand explained, "Sailors lead a rough life and are more apt to use their fists than office employees; what will seem to sedentary and protected persons an insufficient provocation for a personal encounter, is not the measure of the 'disposition' of 'the ordinary men in the calling.' "[7] A seaman is not unfit merely because he is irascible; he fails to meet the seaworthy standard only if he possesses a savage and

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[2] *Webb v. Dresser Indus.* 536 F.2d 603, 606 (5th Cir.1976), *cert. denied* 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed.2d 572 (1977); 2 M. Norris, The Law of Seamen § 27:2, at p. 194 (4th ed. 1985).

[3] *See Clevenger v. Star Fish* and *Oyster Co.*, 325 F.2d 397, 399-400 (5th Cir.1963); 1B Benedict on Admiralty § 31 (1987).

[4] *See Boudoin v. Lykes Bros. SS. Co.*, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354 (1955); 2 M. Norris, The Law of Seamen §30:35, at 488 (4th ed. 1985).

[5] *Clevenger*, 325 F.2d at 402.

[6] *See Claborn v. Star Fish & Oyster Co.*, 578 F.2d 983, 987 (5th Cir.1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1281, 59 L.Ed.2d 494 (1979).

[7] *Jones v. Lykes Bros. S.S. Co.*, 204 F.2d 815, 817 (2nd Cir.1953), *cert.denied*, 346 U.S. 857, 74 S.Ct. 72, 98 L.Ed. 370 (1953).

vicious nature.[8]

[6] A crew member's malevolence may be proved by independent evidence with regard to his disposition or by direct evidence showing that he launched a vicious and unprovoked attack.[9] Because what constitutes fitness is largely a fact-specific inquiry, courts rarely determine whether as a matter of law the temperament of a seaman renders a vessel unseaworthy. This court, however, has done so in cases involving an extremely violent assault. In *Clevenger v. Star Fish & Oyster Company,*[10] the first mate stabbed a fellow seaman in the back with a four-foot-long ice chisel following an exchange of "unpleasantries." The court reasoned,

> We extract from the cases the principle that in itself a savage assault with a meat cleaver or similarly dangerous weapon can be sufficient proof that the attacker is "not equal in disposition and seamanship to the ordinary men in the calling." Drunkenness and bellicosity are additional factors to consider when the nature of the assult is inconclusive evidence of the attacker's fitness in terms of his calling.[11]

Similarly, in *Claborn v. Star Fish & Oyster Company,*[12] we

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[8] *Boudoin*, 348 U.S. at 339, 75 S.Ct. at 385.

[9] *Smith v. Lauritizen*, 356 F.2d 171 (3d Cir. 1966); 1B Benedict on Admiralty § 31, at 31-256.

[10] 325 F.2d 397 (5th Cir. 1963).

[11] *Id.* at 402.

[12] 578 F.2d 983 (5th Cir. 1978), *cert denied*, 440 U.S. 936, 99 S.Ct. 1281, 59 L.Ed.2d 494 (1979).

found unseaworthiness as a matter of law when one crewmember stabbed another to death in an assault that was "unprovoked, sudden, extraordinarily savage, and fatal."[13]

[7] The evidence of the nature of the assault here leaves no doubt that Melrose had an extraordinarily violent disposition. He did not merely exchange blows with Torregano or fail to follow the Marquis of Queensberry's rules. Melrose inflicted 62 knife wounds on Torregano: 12 cutting and stabbing wounds to the face, neck, and scalp; 29 stab wounds to the front and back of his chest and abdomen; and 21 wounds to his extremities. The coroner testified that the wounds on Torregano's arms were defense wounds, caused by an instinctive reaction to escape injury, characteristic of an effort to put up his hands to ward off the knife. Because some of the wounds were concentrated in one area on Torregano's back, the coroner concluded that they had been inflicted at some point when Torregano was immobilized and unable to defend himself. The coroner explained, "the nature of these wounds is sort of what I refer to as a stabbing frenzy, when [Torregano] was simply down, incapacitated and multiple stab wounds are inflicted in rapid succession in the same general area." Since no evidence contradicts the coroner's version, we conclude that like the assailant in *Claborn*, Melrose appears to have gone "[j]ust wild, beserk[sic]."[14] This uncontroverted evidence, fully suported by the physical facts, is sufficient to establish as a matter of law that Melrose was an especially violent seaman not up to the standard of the calling.

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[13] *Id.* at 987.

[14] 578 F.2d at 987.

The defendants contend, however, that there is a factual question whether Torregano provoked or initiated the attack that bars finding unseaworthiness as a matter of law. We disagree. Construed most favorably to the defendants, the evidence that Torregano attacked Melrose is negligible. It is the fact that Melrose was found with a blood-stained towel wrapped around his arm and a union official's hearsay statement that the company agent told him Melrose was cut on his hands. There is no direct evidence that Melrose has suffered any injury, let alone one inflicted by Torregano, or that the blood stains were aught but Torregano's. Indeed the evidence presented supports the conclusion that Melrose was the initial aggressor. Torregano was killed in his own room. Jackson testified that Melrose argued with him less than an hour before Torregano's death about the victim's inadequate work. Jackson also testified that he thought Melrose had been drinking and was very hostile and out of control.

[8] Relying on the description in *Claborn* that the assailant attacked his victim "without warning or provocation,"[15] and to the similar language in *Clevenger* that the attack was "without word or warning,"[16] the defendants argue that the plaintiffs must prove that the attack was unprovoked. The test of unseaworthiness, however, is whether the assailant is equal in disposition and seamanship to the ordinary men in the calling. That the attack was unprovoked or sudden are *factors* to be considered in making that determination, but they are not the test itself.

Thus, even if Torregano had initiated the attack by cutting Melrose's arm, the question remains whether

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[15] *See id.* at 986-87.

[16] *Clevenger*, 325 F.2d 398.

Melrose's response was proportionate with the provocation in any degree. Was the response one of an ordinary seaman or one of a person with vicious propensities? Melrose weighed between 75 and 100 pounds more than his victim. Torregano suffered more than 20 wounds on his arms while fending off the attack and multiple stab wounds to his back while he was "in some way immobilized, perhaps unconscious." This evidence suggests that Melrose had control of or completely subdued Torregano throughout the struggle.

Moreover, in cases undoubtedly frequent, when there are no witnesses to an attack, the defendant cannot merely rely on an injury to defeat a finding of unseaworthiness as a matter of law. In a violent struggle in which the victim fights for his life, it is not unusual for the assailant to suffer some injury as well. There is no evidence concerning how or when Melrose was cut. The alleged laceration might have been caused by the victim's fingernails or a sharp object he grabbed during the struggle. It might have been inflicted by Melrose himself during his wild stabbing episode. It would be rare indeed for the assailant to escape completely unscarred from such slim and speculative evidence of provocation to defeat a finding of unseaworthiness as a matter of law would bar such a determination in cases involving the most egregious and violent incidents. We refuse to hold that a finding of unseaworthiness as a matter of law may exist only in cases in which an eyewitness can verify the lack of provocation. Instead, we reaffirm the holding of *Clevenger* that "in itself a savage assault with a meat cleaver or similarly dangerous weapon can be sufficient proof that the attacker is 'not equal in disposition and seamanship to the ordinary men in the calling.' "[17]

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[17] *id.* at 402.

The savagery of the attack itself leads us to conclude that Melrose has an especially dangerous disposition. As a matter of law, Melrose failed to measure up to the standard of his calling and rendered the vessel unseaworthy. The district court erred in not entering a judgment notwithstanding the verdict on unseaworthiness, since "the facts and inferences point so strongly and overwhelmingly in favor of [plaintiff] ... that reasonable men could not arrive at a contrary verdict."[18]

III.

The shipowner claims the court erred in denying its motion for a directed verdict on the issue of Jones Act negligence. Ordinarily when we have found for the plaintiff on the issue of unseaworthiness, we need not consider the question of Jones Act negligence.[19] However, since Miles rests her claim for punitive damages in part on the Jones Act, we address the issue.

[9] The standard of review for the sufficiency of the evidence to establish claims arising under the Jones Act is less exacting than that for general maritime law claims. The evidence suffices unless there is a "complete absence of probative facts" to support the non-movant's position.[20]

"Establishing shipowner negligence in assault cases normaly requires evidence supporting either of the following propositions: 1) that the assault was committed by the

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[18] *Boeing Co. v. Shipman*, 411 F.2d 365, 274 (5th Cir. 1969).

[19] Claborn, 578 F.2d at 987; *see also Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 340, 75 S.Ct. 382, 385, 99 L.Ed. 354 (1955).

[20] *Fontenot v. Teledyne Movible Offshore, Inc.*, 714 F.2d 17, 19 (5th Cir. 1983).

plaintiff's superior for the benefit of the ship's business, or 2) that the master or ship's officers failed to prevent the assault when it was foreseeable."[21] A seaman in a Jones Act case has only a "featherweight" burden of proof; he need prove only slight negligence, "which can be accomplished by very little evidence."[22]

[10,11] Since there is no evidence that Melrose was acting for the benefit of the ship's business, only the second basis for negligence is tenable. We therefore reject Miles' contention that "the negligent actions of Melrose himself in becoming intoxicated and losing control" is sufficient evidence on which to find the vessel negligent. Miles points to other evidence, however, that does address the failure of the officers to prevent a forseeable assault: (1) Jackson, the chief steward, knew Melrose was hostile, argumentative, and "on something" immediately prior to the assault on Torregano; (2) Jackson knew Melrose was belligerent and argumentative when he drank yet allowed him to do so; and (3) Jackson allowed drinking on board despite the ship board rule prohibiting it. Given the slight burden of proof, we find Jackson's testimony sufficient evidence to create a question for the jury whether Apex was negligent. We therefore uphold the district court's denial of judgment notwithstanding the verdict on the issue of the defendants' negligence under the Jones Act.

IV.

[12,13] Miles contends that the evidence is insufficient to support the jury's verdict that Torregano was 7% contibutorily negligent for the assault. Comparative negligence applies in both Jones Act and unseaworthiness actions, barring an injured party from recovering for the

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[21] 1B Benedict on Admiralty § 31, at 3-242 (1987).

[22] *Allen v. Seacosat Prods.*, 623 F.2d 355, 360 (5th Cir. 1980).

damages sustained as a result of his own fault.[23] The defendant has the burden of proving that the plaintiff was contributorily negligent and that such negligence was the proximate cause in producing his injury.

[14-16] The special interrogatories to the jury did not specifically assign the contributory-negligence finding made to the negligence claim or the unseaworthiness claim. When injuries stem from a single accident or event, it is not inappropriate to submit a single interrogatory concerning the amount of damages. We apply different standards of review, however, to Jones Act claims and general maritime law claims in deciding whether the evidence was sufficient to submit the case to the jury and whether, as a matter of law, the evidence would support the jury's verdict. For claims arising under general maritime law we apply the "reasonable minds" standard. For sufficiency claims under the Jones Act, we apply the stricter "complete absence of probative facts" standard whether we are reviewing findings regarding a defendant's or plaintiff's negligence.[24]

[17] The defendants' theory of contibutory negligence relies on the same evidence as their theory that Torregano provoked the attack: primarily the testimony that there was a blood-soaked towel on Melrose's arm, creating the inference that Melrose had been cut by Torregano. For the reasons already given in rejecting the provocation argument, and given the defendants' burden of proving contributory negligence, the evidence that Torregano initialed the altercation by cutting Melrose is not sufficient to support the jury's finding that Torregano was

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[23] *See Fontenot*, 714 F.2d at 19; *see also* 2 N. Norris, The law of Seamen § 27:19 (4th ed. 1985).

[24] *Fountenot*, 714 F.2d at 19.

7% contibutorily negligent for his death. Considering the savagery of the assault, the complete absence of any evidence that the victim acted aggressively toward the assailant or anyone else, and the testimony that the assailant was under the influence of alcohol, hostile, angry, and complaining about the victim just prior to the attack, the mere fact that Melrose might have had a cut on his arm, if indeed he did, without more, is insufficient evidence of contibutory negligence, even under the stricter "complete absence of probative facts" standard. The district court erred in not directing a verdict or granting Miles' motion for a judgment notwithstanding the verdict on the issue.

V.

[18] The defendants' also contend that the evidence was insufficient to support the jury's verdict that Torregano experienced conscious pain and suffering before he died. We find the corner's testimony sufficient to create a factual issue on this point. Although he could not establish when Torregano lost consciousness, the corner testified that the configuration of Torregano's wounds suggests that he was conscious for some time during the attack, because the slashing and cutting wounds on Torregano's face and arms are characteristic of the "instinctive reaction of someone to ward off an implement." From this the jury could infer that the victim experienced post-impact pain and suffering. Direct evidence is not required.[25] We therefore affirm the district court's denial of defendants' motion for judgment notwithstanding the verdict on this issue.

VI.

Having found the M/V ARCHON unseaworthy as a

[25] *See Pregeant v. Pan American World Airways*, 762 F.2d 1245, 1250 (5th Cir. 1985).

matter of law, we confront two questions of first impression for this circuit concerning the proper scope of damages under the general maritime law. May the deceased's estate bring a survival action for the recovery of the victim's future economic loss? In a wrongful death action, may the nondependent parents of a deceased seaman, survived by neither spouse nor child, recover for loss of society?

A.

Torregano's estate seeks to recover the earnings that would, but for his death, have been income to him during his life expectancy. Apex first asserts that this issue cannot be raised on appeal because Miles did not sue on behalf of the estate, and because the claim for future losses was not raised in the trial court. Both contentions are incorrect. Miles appeared in her initial pleading "individually and in her capacity as administratrix of the succession of Ludwick A. Torregano." On the third day of trial, she raised the issue whether the estate is entitled to recover the future economic loss of the decedent. Since the district court held that the Fifth Circuit does not allow such damages, the merits of the issue are properly before us.

[19,20] In a survival action, the estate or successors of a deceased person are allowed to prosecute a claim for personal injury that the deceased himself would have had but for his death. In a wrongful death action, the victim's dependants, not the victim, are allowed to recover for the harms they personally suffered as a result of the death, independant of any action the decedent may have had for his own personal injuries. Neither cause of action was permitted at common law, which followed the rule that personal

tort actions died with the plaintiff.[26]

[21] Until the Supreme Court's decision almost twenty years ago in *Moragne v. States Marine Lines, Inc.*,[27] the general maritime law followed the common law rule barring survival and wrongful death actions. In *Moragne*, the Supreme Court recognized a wrongful death action for negligence and unseaworthiness under the general maritime law. The Court, noting that every state and many federal statutes included wrongful death provisions, concluded that such actions have become part of our general law.[28] In recognizing the action, the Court stated that the general maritime law would be guided, but not bound by the wrongful death statutes already in force. It explained, "If ... subsidiary issues should require resolution, such as particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful death statutes have been implemented with success for decades."[29]

The Supreme Court has not yet recognized a cause of action for survival benefits under general maritime law; *Moragne* and subsequent cases considered by the Court involved wrongful death benefits. After *Moragne*, however, numerous decisions of this and other circuits have recognized that, under the principles announced in that decision, the general maritime law includes a survival action permitting recovery for the victim's pre-death pain

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[26] W. Keeton, D. Dobbs, R. Keeton, D. Owen Prosser and Keeton on the Law of Torts § 125A-126, at p. 940-41 (5th Ed. 1984)[hereinafter Prosser on Torts].

[27] 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

[28] *Id.* at 390, 90 S.Ct. at 1782.

[29] *Id.* at 409, 90 S.Ct. at 1792.

and suffering.[30] Following the rationale of *Moragne*, which looked to the proliferation of state wrongful death acts to find that such an action had become part of our general law, courts reasoned that a survival action for pain and suffering should be recognized as well, since the Jones Act and almost all states allow such survial actions.[31]

Torregano's estate contends that the general maritime law should also recognize a survival action for the decedent's lost future income. In *Evich v. Morris*,[32] the Ninth Circuit allowed an estate to bring such an action when there were no dependents. The court acknowledged that the Jones Act and the majority of states do not allow future economic loss to be recovered in survival actions. Nevertheless, it held:

> [W]e find recovery here " 'better becomes the humane and liberal character of proceedings in admiralty' ", *Moragne*, 398 U.S. at 378, 90 S.Ct. at 1780 (citation omitted), and prevents the anomaly of rewarding a petitioner for killing his victim rather than injuring him, *se id.* at 395, 90 S.Ct. at 1784. Most states and the Jones Act allow these damages to be recovered in the form of loss of support. When, as here, those beneficiaries do not exist, potential problems with double recovery do not exist. Under these circumstances the decedent's estate should be compensated for loss of future earnings. *See*

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[30] *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984); *Law v. Sea Drilling Corp.*, 523 F.2d 793, 795 (5th Cir. 1975); *Barbe v. Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974); *Spiller v. Lowe*, 466 F.2d 903, 909 (8th Cir. 1972).

[31] *See, e.g., Spiller*, 466 F.2d at 909.

[32] 819 F.2d 256 (9th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 261, 98 L.Ed.2d 218 (1987).

Kriesak v. Crowe, 36 F.Supp. 127, 129 (M.D.Pa. 1940).[33]

We are not persuaded that the reasons advanced in *Evich* support recognizing an additional basis for recovery. While the liberality of admiralty proceedings informs the development of maritime jurisprudence, it does not license courts to create causes of action whenever they see fit. *Moragne* did not recognize a maritime cause of action for wrongful death merely because it was humane to do so. Rather, it recognized the wrongful death action within the context of an almost universal rejection of the common law rule barring such actions.[34] Furthemore, in its reference to a dependent's recovery for support under wrongful death statutes and the Jones Act, *Evich* erroneously equates a policy of supporting dependants with one of making an estate whole for the loss of future earning capacity.

The Court in *Moragne* was strongly influenced by the fact that the Jones Act, the Death on the High Seas Act (DOHSA), and every state departed from the harshness of the common-law rule and enacted wrongful death provisions. It explained: "This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law."[35] In contrast, most state survival statutes and the Jones Act do not allow recovery for lost wages.[36] DOHSA gives no action for any kind of survivorship benefit. The recognition of an estate's survival action for lost wages would alone in

33 *Evich*, 819 F.2d at 258.

34 *See Moragne*, 398 U.S. at 385, 90 S.Ct. at 1780.

35 *Id.* at 390-91, 90 S.Ct. at 1782.

36 *See Evich*, 819 F.2d at 258.

admiralty law in contrast to the prevalence of wrongful death statutes that informed the decision in *Moragne*. Furthemore, since Jones Act survival claims do not extend to the decedent's lost wages,[37] uniformity of maritime law is not served by allowing such an action under the general maritime law. We conclude that the general maritime law does not permit a survival action for the deceased's lost future wages.

B.

[22] Miles contends that in a wrongful death action under the general maritime law the nondependent parents of a deceased seaman may recover for loss of society when there is no surviving spouse or child. She asserts the claim on behalf of herself as mother and Joseph Torregano as father; however, since Torregano has not filed a notice of appeal, we have jurisdiction to hear only Miles' claim.[38]

Moragne left open the question whether a wronful death action under general maritime law would permit recovery beyond the pecuniary-damages-only limits of the Jones Act and DOSHA. In *Sea-Land Services, Inc. v. Gaudet*, [39]the Court held that the surviving spouse could, in addition to recovering pecuniary damages, be compensated for loss of society, that "broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship,

37 *See generally* 2 Benedict on Admiralty § 84, at n 36 (7th ed. 1988).

38 *See Torres v. Oakland Scavenger Co.*, ___ U.S. ___, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988).

39 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974).

comfort, and protection."[40] Since the policy underlying the remedy in *Moragne* is "to insure compensation of the dependents for their losses resulting from the decedent's death,"[41] the Court concluded that a decedent's dependents may recover damages for their loss of support, services, and society.[42]

Miles suggests that in *Skidmore v. Grueninger*[43] we allowed a nondependent adult daughter to recover for loss of society. This is in error. We agree with Judge Carr's careful analysis in a recent district court opinion[44] that, although in *Skidmore* we did not address the issue whether the decedent's 19 year old daughter had been dependent on the decedent, the district court in that case explicitly found that she was. Thus the issue raised here, whether nondependents may recover for loss of society when there is no surviving spouse or child, is one of first impression for this circuit.

In *Sistrunk v. Circle Bar Drilling Company.*[45] we held that nondependent parents of a seaman killed in territorial waters who was survived by a spouse or child could not recover for loss of society. Our analysis in *Sistrunk* primarily relied on the twin aims of maritime law that in-

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[40] *Id.* at 585, 94 S.Ct. at 815.

[41] *Id.* at 583, 94 S.Ct. at 814 (emphasis in original).

[42] *Id.*

[43] 506 F.2d 716 (5th Cir.1975).

[44] *See Neal v. Barisich, Inc.*, 707 F.Supp. 862, 871 & n. 38 (E.D.La.1989).

[45] 770 F.2d 455 (5th Cir.1985), *cert.denied*, 475 U.S. 1019, 106 S.Ct. 1205, 89 L.Ed.2d 318 (1986).

formed the creation of the wrongful death action in *Moragne:* achieving uniformity in the exercise of admiralty jurisdiction and providing special solicitude to seamen. We concluded that "denial of recovery lends more uniformity to admiralty jurisdiction than allowing recovery," because the parents could not recover loss of society damages under either the DOSHA or the Jones Act.[46] The same is true of those relatives of a seaman who is not survived by a spouse or children, since DOSHA limits recovery to pecuniary losses[47] and the survivors cannot recover for loss of society under the Jones Act.[48] *Sistrunk* concluded that the second aim of maritime law, providing for the special solicitude of seamen, would not be furthered in any meaningful way by allowing nondependent parents to recover for loss of society. We explained:

> To the extent that the purpose of adminalty's special solicitude to the survivors of seamen is to provide for their *financial support*, the special solicitude aim of admiralty has no relevance in this case. *The parents in this case were not dependent on their sons.*

If a purpose of the solicitude is to provide the survivors *peace of mind* both before a seaman undertakes to venture upon hazardous and unpredictable sea voyages and after the death of the seaman, admiralty's special solicitude does not automatically mean that the parents in this case should recover. As stated above, the parents

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[46] *Sistrunk*, 770 F.2d at 459.

[47] *See* 46 U.S.C.App. § 762.

[48] *Ivy v. Security Barge Lines, Inc.* 606 F.2d 524, 529 (5th Cir.1979) (en banc), *cert. denied*, 446 U.S. 956, 100 S.Ct. 2927, 64 L.Ed.2d 815 (1980).

> could not recover if the seamen's deaths occurred on the high seas or were the result of negligence but not of unseaworthiness. *Admiralty cannot provide the parents solicitude at a voyage's outset when their right to recover for loss of society is dependent on the fortuity that the deaths occur in territorial waters and are caused by unseaworthiness.* Similarly, the parents have not explained why this court should extend to them special solicitude when, but for the happenstance that the seamen were killed in territorial waters and by unseaworthiness, Congress would have denied them recovery under DOHSA and the Jones Act.[49]

Since the parents here were also not dependent on their son and since they too could not recover these damages under the Jones Act or DOSHA, we do not contravene maritime law's aim of providing special solicitude to seamen by denying them recovery for loss of society.

The final factor considered in *Sistsrunk*, the extent to which maritime law and state wrongful death actions allow nondependent parents of a deceased seaman with a spouse or offspring to recover for loss of society, also counsels against allowing such recovery here. As already discussed, Miles cannot recover for loss of society under the Jones Act or DOHSA. State wrongful death statutes take a variety of approaches to whether nondependent parents may recover for loss of society: some deny recovery for all non-pecuniary injuries,[50] some deny recovery for all

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49 *Sistsrunk*, 770 F.2d at 460 (emphasis added).

50 *See, e.g.*, N.Y. Est. Powers & Trusts Law § 5-4.3.

society claims,[51] and some allow recovery for loss of society, but only for that of minor children.[52] Thus, unlike the wrongful death statutes relied on in *Moragne*, the statutory provisions concerning recovery for loss of society by nondependent parents of a decedent survived by neither spouse nor child are without pattern.

Since loss of society is not a financial loss, restricting its recovery to dependents may seem unwarranted. However, tort law has never recognized a principle of awarding redress to all who are injured by an event, however wide the ripple. Strict liability, such as that for unseaworthiness, is based in part on the assumption that the defendant is best able to bear and distribute the cost of the risk of injury. But there are limits to a defendant's power to shift losses to the public. The larger and more amorphous the potential class of plaintiffs, the more difficult it is to estimate and insure against the risk in advance, weakening the justification for imposing liability.[53] The number of plaintiffs who could allege a loss of love and affection as a result of the death of a dearly beloved seaman—aunts and uncles, nieces and nephews, even friends and lovers—necessitates that we draw a line between those who may recover for loss of society and those who may not. The line suggested by the Supreme Court in *Moragne* and *Gaudet*, and by our own court in *Sistrunk*, the line between dependants and nondependants, "appears to be the most

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51 *See, e.g.*, Conn.Gen.Stat.Ann. §§ 52-555.

52 *See, e.g.*, Vt.Stat.Ann. tit. 14, § 1492.

53 *See generally* Prosser on Torts, *supra*, at pp. 23-25.

rational, efficient and fair."[54] It creates a finite, determinable class of beneficiaries. It allows recovery for those with whom the creation of the wrongful death action was concerned: a seaman's dependents. We therefore hold that in a general maritime wrongful death action nondependent parents may not recover for loss of society whether or not their deceased children were survived by spouse or child.

VII.

After the close of the plaintiffs' case, the district court dismissed their claim for punitive damages. Miles contends that she produced sufficient evidence to raise a jury issue regarding punitive damages under the general maritime law.

[23] Punitive damages are recoverable under the general maritime law "upon a showing of willful and wanton misconduct by the shipowner" in failing to provide a seaworthy vessel.[55] Because punitive damages are designed to punish the wrongdoer, more than simple negligence is required. The defendant must have been guilty of "'gross negligence, or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct.'"[56]

[24] Miles contends that a jury issue is raised regarding punitive damages by the evidence that Jackson, the

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54 *Truehart v. Blandon*, 672 F.Supp. 929, 938 (E.D.La.1987).

55 *In Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 626 (5th Cir.1981).

56 *Id.* at 624-25 (quoting *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2nd Cir.) *cert. denied*, 409 U.S. 982, 93 S.Ct. 318, 34 L.Ed.2d 246 (1972)).

ship's chief steward, permitted Melrose to drink alcohol on board, despite the ship's prohibition against it and Jackson's knowledge that Melrose became more violent when he drank. In order to recover punitive damages against Apex for Jackson's behavior, Miles asks us to follow the rule articulated in the Restatement (Second) of Torts, under which punitive damages can be assessed against a principal as a result of an agent's act if the agent was employed in a managerial capacity and acted in the scope of his employment.[57] Not all courts have agreed with this standard[58] and we need not decide the issue here. Assuming without deciding that the Restatement is the proper standard and that the steward was acting within the scope of his employment, we find no basis for an award of punitive damages. Jackson's mere tolerance of Melrose's drinking, while perhaps negligent, is not the type of outrageous conduct that justifies imposing punitive damages. The evidence was thus insufficient to present to the jury on the issue.

VIII.

The district court dismissed both the plaintiff's and the defendants' suits against the Seafarers International Union for failure to state a claim, but only the defendants have appealed the dismissal. While they originally asserted claims in both tort and contract, the defendants concede that they have no contract claim against the union and abandon their argument that a union has a duty to investigate a member's background. The only theory on

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57 *See* Restatement (Second) of Torts § 909 (1964); *Protectus Alpha Navigagion Co. v. North Pacific Grain Growers*, 767 F.2d 1379, 1386 (9th Cir.1985).

58 *See, e.g., McGuffie v. Transworld Drilling Co.*, 625 F.Supp. 369 (W.D.La.1985).

which they now rely is that when a union knows of a worker's violent nature and can foresee that he consequently may assault others, it has a duty under the general maritime law to warn the owners and operators of the vessel to whom it sends him.

A.

[25,26] The district court held that the collective bargaining agreement between the union and Apex Marine Corporation and Westchester Marine Shipping Company covers the alleged duty-to-warn tort claim. Under § 301 of the Labor Management Relations Act of 1947,[59] a tort claim "inextricably interwined with consideration of the terms of the labor contract" is preempted by federal labor-contract law.[60] A claim sufficiently independent of the collective-bargaining agreement, however, withstands the preemptive force of § 301.[61] Thus, "[t]he threshold inquiry for determining if a cause of action exists, is an examination of the contract to ascertain what duties were accepted by each of the parties and the scope of those duties."[62]

The key question about the "independence" of the tort is whether the determination of liability *under the tort claim* requires an interpretation of the collective bargain-

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[59] 29 U.S.C. § 185.

[60] *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 105 S.Ct.1904, 1912, 85 L.Ed.2d 206 (1985).

[61] *International Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 857-60, 107 S.Ct. 2161, 2166-67, 95 L.Ed.2d 791 (1987).

[62] *Id.* at 859, 107 S.Ct. at 2167.

ing agreement.[63] For example, in *Lingle v. Norge Division of Magic Chef, Inc.*,[64] *the most recent Supreme Court case addressing* § 301 preemption, a unanimous Court held that an employee's state law claim for retaliatory discharge was not preempted by a collective bargaining agreement, despite the contract provision protecting employees from discharge without "just cause." Since the facts required to show retaliatory discharge—that the employee was discharged and the employer's motive was to deter him from exercising his rights under the state worker's compensation act—did not require the court to interpret any term of the collective-bargaining agreement, the state law remedy was "independent" of the agreement.[65] That determination of the retaliatory discharge claim might involve analysis of the same facts as the determination whether the worker was fired for just cause under the contract is irrelevant. The Court explained, "§ 301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreement."[66]

The district court found the alleged duty-to-warn claim preempted by the job-referral provision of the SIU-Apex agreement.[67] Article I, § 2 states in pertinent part:

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[63] *See id; Allis-Chalmers*, 471 U.S. at 218, 105 S.Ct. at 1914-15 (1985).

[64] ___U.S.___, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988).

[65] *Id.* at ___, 108 S.Ct. at 1882.

[66] *Id.* at ___, 108 S.Ct. at 1883.

[67] The Union cites other contract provisions that clearly do not address the facts alleged: the employer does not know the worker is violent and

> The Union agrees to furnish the Company with capable, competent and physically fit persons when and where they are required, and of the ratings needed to fill vacancies necessitating the employment of Unlicensed Personnel in ample time to prevent any delay in the scheduled departure of any vessel covered by this agreement. . . . If, for any reason, the Union does not [meet the above commitment], the Company may then obtain members of the Unlicensed Personnel from any available source, in which case the Union shall be notified.

This provision, however, is concerned with when a vessel may bypass the union hiring hall to obtain crew members. It does not address whether the union has an obligation to warn the company when it knows of a member's violent propensities.

[27] To establish the alleged duty-to-warn cause of action, a plaintiff would have to show that the union (1) knew a worker had violent propensities; (2) could foresee that he might injure other crew members; and (3) did not warn the ship-owner. As in *Lingle,* this is a purely factual inquiry that does not require construing the collective-bargaining agreement. Since reference to the contract is not needed to resolve the issue of liability, the claim of a duty to warn is sufficiently independent of the contract and not preempted by § 301.

(Footnote 67 continued)
the union does. Thus the contract provision allowing the employer to reject or discharge such workers is inapplicable. Provisions that allow the union not to refer such workers concern the union's rights againsts its members, not the union's obligations toward the employer.

B.

[28,29] We raise, *sua sponte,* the question whether the alleged tort claim is within the federal courts' admiralty jurisdiction,[68] since the alleged wrongful act, the failure of the union to warn the ship-owner/operator, occurred on land. For a tort claim to invoke federal admiralty jurisdiction, the alleged wrong must have a maritime locality and bear a significant relationship to traditional maritime activity.[69] Under the locality test, a tort occurs "where the alleged negligence took effect," rather than where the negligent acts or omissions occurred.[70] The locality requirement is satisfied here since the injury, the exposure of Apex to liability for Torregano's death, occurred on navigable waters.[71]

The alleged tort is also significantly related to maritime activity.[72] The injury occurred to a seaman on a vessel at sea. The functions and roles of all the parties are inextricably tied to the maritime industry: the deceased and alleged assailant were seamen employed on a vessel, the third-party plaintiffs owned and operated the vessel, and the third-party defendant was a seamen's union. The

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[68] U.S. Const. art. III, § 2.

[69] *Molett v. Penrod Drilling Co.,* 872 F.2d 1221, 1224 (5th Cir.1989); *Woessner v. Johns-Manville Sales Corp.,* 757 F.2d 634, 639 (5th Cir.1985).

[70] *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 266, 93 S.Ct. 493, 503, 34 L.Ed.2d 454 (1972).

[71] *See Molett,* 872 F.2d at 1224.

[72] *See Kelly v. Smith,* 485 F.2d 520, 525 (5th Cir.1973), *cert. denied,* 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974); *Parker by and through Parker v. Gulf City Fisheries,* 803 F.2d 828, 830 (5th Cir.1986); *Molett,* 872 F.2d at 1224; *see also id.* at 1229-30 (Jones, J., concurring and dissenting).

law of admiralty, moreover, "'has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters,'"[73] and the plaintiff's claim that the vessel was unseaworthy is unique to maritime law. The alleged tort is thus within our admiralty jurisdiction.

C.

We now turn to the issue whether a union has a duty under the general maritime law to warn a shipowner or operator with whom it has a collective bargaining agreement of the known violent propensities of a member sent to work on the owner's vessel. This alleged duty is much narrower than the duty to provide a safe workplace on which the union premises many of its arguments. The claim is not that the union had a duty to control Melrose, only that it failed to exercise ordinary care by telling Apes: "This man has a violent past." Since the injury is the exposure to liability for unseaworthiness and Jones Act negligence, the defendants' third-party claim is one for indemnity or contribution from the union for its negligence in causing the seaman's injuries.

We must assume for the purpose of deciding whether the claim is cognizable that the alleged negligence can be proved: the union knew Melrose was dangerous, could forsee that he would injure other crew members and thereby expose the vessel to liability, and the union's failure to warn the vessel was in fact the legal cause of the injury. The plaintiffs must also establish that the union owed it a duty of care that was breached by this negligence.

[30] Under general tort law principles, there is no du-

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73 *Gulf City Fisheries*, 803 F.2d at 830 (citing *Kelly*, 485 F.2d at 526).

ty to warn a stranger of danger, no matter how grave or imminent. The Restatement (Second) of Tort § 314 explains:

> The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

A comment to § 314 indicates a limit to this principle applicable to our analysis:

> The rule stated in this Section applies only where the peril in which the actor knows that the other is placed *is not due to any active force which is under the actor's control.* If a force is within the actor's control, his failure to control it is treated as though he were actively directing it and not as a breach of duty to take active steps to prevent its continuance.[74]

For example, a factory owner sees a blind man who has wandered into his factory, about to approach a piece of moving machinery. The owner is negligent if he permits the machinery to continue in motion when by the exercise of reasonable care he could stop it before the man comes into contact with it. The owner, who can control the machinery presenting the peril, is liable but a bystander is not.[75] Similarly, the union is no mere bystander. Through the internal policies and procedures of its hiring hall, the union sent Melrose to the M/V ARCHON, rather than stop the referral because it knew he was dangerous. In choosing not to exercise that control, but instead to permit the referral

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74 Restatement (Second) of Torts § 314 comment d (1964) (emphasis added).

75 *See id.* illustration 2.

process to continue, the union is like the factory owner who is liable for allowing its machinery to continue in motion.

[31] In addition, when the defendant stands in a special relationship with the injured party, the law may impose a duty to exercise reasonable care under the circumstances to protect that party from injury.[76] Thus the torts of third persons may render innkeepers liable to guests,[77] common carriers to passengers,[78] and prison officials to inmates.[79]As the reporters of the Second Restatement of Torts recognized twenty-five years ago, "The law appears . . . to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence."[80] The shipowner or operator is particularly vulnerable and dependent upon the union because it must hire workers through the union hiring hall. In the context of the owner/operator's absolute liability if a worker does not meet the standard of his calling, this referral relationship is sufficient to impose a duty on the union to warn the vessel if it sends a dangerous seaman.[81]

Furthermore, the concern of maritime law with the

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76 *See* Prosser on Torts, *supra*, at § 56; *see also* Restatement (Second) of Torts § 314A (1964).

77 *Nordmann v. National Hotel Co.*, 425 F.2d 1103 (5th cir.1970).

78 *Skipper v. New Orleans Pub. Serv.*, 338 So.2d 771 (La.App.1976).

79 Parker v. State, 261 So.2d 364 (La.App. 1972), *aff'd*, 282 So.2d 483, *cert. denied*, 414 U.S. 1093, 94 S.Ct. 724, 38 L.Ed.2d 550 (1973).

80 Restatement (Second) of Torts § 314 comment b (1964).

81 *Df. McKeithen v. S.S. FROSTA*, 441 F.Supp. 1213, 1216 (E.D.La.1977) (dicta: pilots association may stand in special relationship to the owners of vessels to whom it assigns pilots).

safety of seamen is promoted more by allowing than by denying this third-party suit for indemnity or contribution. The shipowner is still absolutely liable for providing a seaworthy vessel; that duty does not shift to the union. Nevertheless, a union who knows and forsees that a member will injure others, when the employer lacks such knowledge, is in a unique position to prevent the harm by not referring him to a vessel. Allowing the vessel to seek indemnity from the union promotes the purposes of the doctrine of unseaworthiness by "plac[ing] liability on the party who was truly at fault and who should mend his negligent ways to prevent further injury."[82] To hold otherwise would shield the union from liability even if it referred a seaman who told union officials that he intended to kill a crew member when he got on board a vessel. Thus even though the harm here is not the seaman's physical injury, but the employer's exposure to economic liability, the seaman's safety can be promoted best by allowing the employer to seek indemnity or contribution for its economic loss.

Allowing such claims does not upset the established doctrines of general maritime law or labor law. The owner or operator of the vessel still warrants its seaworthiness. The union is not charged with a warranty as to the disposition of the crew or with any special duty to determine if a member is violent. It is merely required to exercise ordinary care when it in fact knows that a worker is a[sic] likely to harm other crew members. What the union knew and could foresee, as well as what constitutes ordinary care, are questions for the jury. Since the union already has the right not to send workers whose behavior is dangerous, its members are not additionally harmed by the union's exer-

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82 *Flunker v. United States*, 528 F.2d 239, 243 (9th Cir.1975).

cising its lesser right to warn the shipowner of the danger.

We hold that because of the union's active role in sending workers to vessels, the special relationship between the union and the maritime employer, the union's unique ability to prevent the harm, and admiralty law's concern with the safety of seamen, the union has a duty under the general maritime law toward the owner or operator of a vessel to exercise reasonable care when it knows of a worker's violent propensities and can foresee that he consequently may assault other crew members and thereby expose the employer to liability. We reverse the district court's dismissal of the third-party claim and remand for factual development consistent with this opinion. In so doing, we intimate no view about the merits of the claim.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
FEB 29 1988

MERCEDEL W. MILES, ET AL	CIVIL ACTION
versus	No. 85-4728
CLIFFORD A. MELROSE, ET AL	SECTION B (3)

J U D G M E N T

This matter having come on for trial on Tuesday, January 19, 1988, and having been submitted to the jury on Friday, January 22, 1988, and in consideration of the jury's responses to the special interrogatories and, after a polling of the jury, in accordance with the jury's verdict on Saturday, January 23, 1988.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, Mercedel W. Miles, Individually and as Administratrix of the Succession of Ludwick Adam Torregano, and against the defendants, Apex Marine Corporation, Westchester Marine Shipping Company and Archon Marine Company under the Jones Act, finding defendants negligent in the death of Ludwick A. Torregano.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, Aeron Marine Company, and against the plaint-

DATE OF ENTRY Feb 29 1988

iff, Mercedel W. Miles, Individually and as Administratrix of the Succession of Ludwick Adam Torregano, finding that the vessel M/V ARCHON was not unseaworthy at the time of the incident.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, Mercedel W. Miles, Individually and as Administratrix of the Succession of Ludwick Adam Torregano, and against the defendants, Apex Marine Corporation, Westchester Marine Shipping Company, and Archon Marine Company, in the amount of ONE HUNDRED FORTY-THOUSAND AND NO/100 ($140,000.00) DOLLARS for the pain and suffering of Ludwick A. Torregano prior to his death, to be reduced by 7%, or NINE THOUSAND EIGHT HUNDRED AND NO/100 ($9,800.00) DOLLARS, the amount of contributory negligence found on the part of the deceased, Ludwick A. Torregano, together with legal interest thereon from date of judgment until paid and all costs of these proceedings;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, Mercedel W. Miles, Individually and as Administratrix of the Succession of Ludwick Adam Torregano and againsts the defendants, Apex Marine Corporation, Westchester Marine Shipping Company and Archon Marine Company, in the amount of SEVEN THOUSAND, EIGHT HUNDRED AND NO/100 ($7,800.00) DOLLARS for Mercedel Miles' loss of support and services of the decedent, Ludwick A. Torregano, to be reduced by 7%, or FIVE HUNDRED FORTY-SIX AND NO/100 ($546.00) DOLLARS, the amount of contributory negligence found on the part of the deceased, Ludwick A. Torregano, together with legal interest thereon from date of judgment until paid and all costs of these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the defendants, Apex Marine Corporation, Westchester Marine Shipping Company and Archon Marine Company and against the plaintiff, Mercedel W. Miles Individually and as Administratrix of the Succession of Ludwick Adam Torregano, denying thereto any claim for loss of society.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the defendants, Apex Marine Corporation, Westchester Marine Shipping Company and Archon Marine Company, and against the plaintiff, Mercedel W. Miles appearing on behalf of the decedent's father, Joseph Torregano, denying to Joseph Torregano any claim for loss of services.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in accordance with the order of this Court entered on September 9, 1987, dismissing the complaint of plaintiff and the third-party complaint of Apex Marine Corporation, and Westchester Marine Shipping Company, Inc. against the Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO, there be judgment herein in favor of the defendant, Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO, and against the plaintiff, Mercedel W. Miles, Individually and as Administratrix of the Succession of Ludwick Adam Torregano, and the defendants/third-party plaintiffs, Apex Marine Corporation, and Westchester Marine Shipping Company, Inc., each party to bear its own costs.

New Orleans, Louisiana, this 29th day of February, 1988.

Judge (Illegible)

NO. 89-1158

In the
Supreme Court of the United States
OCTOBER TERM, 1989

MERCEDEL W. MILES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE SUCCESSION OF LUDWICK ADAM TORREGANO
Petitioner

VERSUS

APEX MARINE CORPORATION, WESTCHESTER MARINE SHIPPING COMPANY, INC., ARCHON MARINE COMPANY AND AERON MARINE COMPANY
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION

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Statutes and Other Authorities

LIST OF PARTIES

The parties involved in this matter include those set forth in the caption. The original action brought by Mercedel W. Miles also was brought on behalf of Joseph Torregano, the decedent's father.

SUMMARY OF THE ARGUMENT

Although petitioner claims the decedent's "estate" should be entitled to recover the future economic loss of the decedent under a maritime survival action, the general maritime law does not recognize the "estate" as a beneficiary entitled to recover such damages. Thus, the claim of petitioner, who attempted to recover indirectly what she was not entitled to recover directly, properly was denied as there was no basis for recognizing the "estate" as a beneficiary under maritime law. In addition, the "future economic loss" of the decedent is not a recoverable item of damages under the general maritime law survival action or under statutory survival action provisions. Recovery in survival actions is limited to the decedent's pre-death damages. Uniformity of the maritime law is best served by rejecting petitioner's claim for items of damages which have not been provided for by statute or recognized by the vast majority of admiralty courts. As the decision of the court below in denying this element of damages is consistent with the precedents of this Court and the decisions of other admiralty courts, the Fifth Circuit's ruling on this issue does not warrant further review.

Petitioner, the nondependent parent of the deceased, also claims she and the nondependent father of the deceased are entitled to recover loss of society damages. However, the thrust of the maritime law and related statutory provisions have been to protect the *dependents* of deceased seamen. Accordingly, this Court has strongly indicated, and the lower courts have held, that only dependents may recover loss of society damages. Policy reasons as well dictate denial of such damages to non-dependents. To hold otherwise could allow any non-dependent relative of a decedent to recover loss of society damages resulting in needless uncertainty as to potential claimants and protracted litigation. The decision of the court below properly denied this element of damages and does not require review by this Court.

ARGUMENT

A. "Estate" Not Entitled to Recover Future Economic Loss

Petitioner's claim for the income which the decedent purportedly would have realized but for his death involves two issues: (1) whether the "estate" is a beneficiary under the general maritime law entitled to recover damages, and (2) whether lost future earnings

are a recoverable item of damages under the maritime survival action.

Petitioner cites only *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987) as authority for such claim. The *Evich* panel's determination that the estate is entitled to recover the decedent's lost future earnings represents a departure from established maritime law. Although the *Evich* court stated that "the recoverability of future economic loss in a post-*Moragne [v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 712, 26 L.Ed.2d 339 (1970)] survival action has not been addressed by a circuit court[,]" *Evich*, at 258, the Sixth Circuit had addressed a closely related issue in the context of a wrongful death action in *Complaint of Cambria Steamship Co.*, 505 F.2d 517 (6th Cir. 1974), *cert. denied*, 420 U.S. 975 (1975). In *Cambria*, the decedent had no dependent relatives; accordingly, the claim for loss of future earnings was asserted on behalf of the decedent's estate. In affirming the district court's determination that the estate was not entitled to such recovery, the Sixth Circuit stated:

> In our view, the liberal and humanitarian character of maritime proceedings as expressed in *Moragne* and *Gaudet*, *supra*, contemplates solicitude for dependents, not inanimate estates.

Similarly, in discussing the same issue, the court in *Fajardo v. Maersk Line Agency*, 1989 A.M.C. 1923 (D.Md. 1988), rejected the claim of the parents of a deceased child for loss of future earnings under the general maritime law. The court specifically rejected the rationale in *Evich v. Morris*, stating:

> Contrary to the abundance of state law and the guidelines of the relevant federal statute, and ignoring the Sixth Circuit's holding in *Cambria*, the [*Evich*] court awarded loss of future earnings to decedent's estate. This Court will not adopt the Ninth Circuit's opinion, but will adhere to the majority of state decisions, the Jones Act, and the Sixth Circuit in denying the decedent's estate compensation for loss of future earnings.

Fajardo, 1989 A.M.C. at 1927.

Only specified classes of beneficiaries are entitled to recover damages for wrongful death and survival actions under the Jones Act, 46 U.S.C. §688, incorporating the Federal Employers' Liability Act, 45 U.S.C. §51 (surviving spouse and children; if none, then parents; if none, then dependent next of kin), the Death on the High Seas Act, 46 U.S.C. §761 (spouse, parents, child, or dependent relative), and the general maritime law (spouse, parents, children and dependent relatives -- *see, e.g., Complaint of Patton-Tully Transp.*

Co., 797 F.2d 206, 212-13 (5th Cir. 1986), *reh'g. denied*, 800 F.2d 262 (5th Cir. 1986)). Neither the federal statutes permitting recovery for wrongful death and survival actions on the high seas or territorial waters nor the general maritime law include the "estate" as a beneficiary. Respondents respectfully suggest that one panel of the Ninth Circuit simply ignored the established classes of beneficiaries entitled to recover damages in wrongful death and survival actions.

Even if the "estate" were a beneficiary under the general maritime law, loss of future earnings of the deceased is not a recoverable item of damages in a maritime survival action. The *Evich* panel acknowledged that the majority of states do not allow future economic loss to be recovered in survival actions and that the Jones Act provides for no such recovery. *Evich*, at 258. That panel further acknowledged that "[m]ost states and the Jones Act allow these damages [for future economic loss] to be recovered in the form of loss of support when wrongful death beneficiaries exist." *Evich, id.* In the case at bar, petitioner, in fact, recovered damages for loss of support. Thus, even assuming the "estate" were entitled to recover for future economic loss, there is an obvious risk of double recovery as the future lost earnings of the decedent form the fund from which the wrongful death proceeds,

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BRIEF OF RESPONDENTS

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SUMMARY OF THE ARGUMENT

THERE IS NO SURVIVAL ACTION FOR LOSS OF A SEAMAN'S FUTURE EARNINGS

Survival actions and wrongful death actions are distinct. The former grants a right of action to the survivors of the decedent to recover those damages sustained by the decedent prior to his death. The latter compensates survivors for their losses resulting from the decedent's death. This Court has specifically held there is no general maritime law survival action. *Cortes v. Baltimore Insular Lines*, 287 U.S. 367, 370-371 (1932); *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 157 (1964). The considerations which gave rise to the recognition of a general maritime law wrongful death action in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 385 (1970), most importantly, to provide a remedy for the dependents of a decedent for their personal loss, do not apply in the case of a maritime survival action. Survival damages are a "windfall" to the beneficiaries. Therefore, neither *Moragne* nor its progeny provides support for the creation of a maritime survival action.

Even if this Court should recognize the existence of a general maritime law survival action, such action is not applicable to seamen as Congress, in enacting the Jones Act, 46 U.S.C. §688, preempted the field with respect to remedies available to seamen and their beneficiaries. The Jones Act, by incorporating the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*, specifically provides for a survival action.

45 U.S.C. §59. Although Congress was well aware of the existence of an action for unseaworthiness as described in *The OSCEOLA*, 189 U.S. 158 (1903), and provided a remedy to seamen to recover damages based upon either negligence or unseaworthiness for non-fatal injuries, a seaman's beneficiaries' remedies for death of a seaman require a finding of negligence. *Lindgren v. United States*, 281 U.S. 38 (1930).

Should this Court determine that the Jones Act does not preclude the creation of a general maritime law survival action applicable to seamen, the damages recoverable under such action must be limited to those damages expressly considered and established by Congress in enacting the Jones Act. As explained by this Court, the survival action incorporated into the Jones Act through the Federal Employers' Liability Act grants a right to a seaman's survivors to recover the loss and suffering he incurred while he lived without taking into account his premature death or what he would have earned or accomplished in the natural span of his life. *St. Louis Iron Mt. & So. Ry. Co. v. Craft*, 237 U.S. 648, 657-58 (1915). The reasoning which compelled this Court in *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978) to limit damages recoverable by a survivor of a decedent, whose death occurred on the high seas, to those damages specifically authorized by the Death on the High Seas Act, 46 U.S.C. §762, should also limit any damages available under a maritime survival action to those specifically allowable under the Jones Act survival provision.

Petitioner's attempt to recover the decedent's future lost wages under a maritime survival action is not supported by the weight of the jurisprudence or statutory authority. Petitioner relies on *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987). The *Evich* panel conceded that the majority of states, as well as the Jones Act, do not provide recovery of the future economic loss of the decedent. However, by confusing concepts and blurring logical distinctions, and relying on *Moragne*'s reference to the "humane and liberal character of proceedings in admiralty," the panel permitted recovery. The court below properly rejected the reasoning in *Evich* noting that, while the humane and liberal character of admiralty proceedings influence the development of admiralty jurisprudence, courts nevertheless are not empowered to create causes of action whenever they see fit. As the Jones Act, DOHSA, most states, and simple logic do not permit recovery of such damages, there is no basis or justification for permitting such recovery.

Uniformity is best served by denying recovery of the future economic loss of the decedent by his estate. If the reasoning in *Evich* were adopted, the result would be the establishment of a different and competing class of beneficiaries from the Jones Act. In addition, it makes little sense to award additional and expanded damages against a party which is liable without fault under the doctrine of unseaworthiness when the remedies provided by Congress in the Jones Act upon proof of negligence preclude such recovery.

DAMAGES FOR LOSS OF SOCIETY CANNOT BE RECOVERED BY NONDEPENDENTS

The Jones Act, by incorporating FELA, restricts the decedent's beneficiaries to recovery of pecuniary damages under the wrongful death provision. *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913), *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980). Similarly, DOHSA limits beneficiaries to recovery of pecuniary damages. Although petitioner claims she is entitled to recover loss of society damages pursuant to *Moragne* and *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), those cases involved longshoremen, and are not controlling with respect to seamen whose rights were expressly established by Congress in the Jones Act. This Court's reasoning in *Higginbotham*, that *Gaudet* damages could not supplement the damages available under DOHSA to the beneficiaries of decedents who died on the high seas, applies with greater force in the case of seamen whose rights have been closely regulated by Congress.

In *Lindgren v. United States*, 281 U.S. 38 (1930) and *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), this Court determined that Congress had occupied the field with respect to the rights of Jones Act seamen and their beneficiaries and further concluded that the general maritime law unseaworthiness remedy could not supplement in death cases the will of Congress as manifested in the Jones Act. To supplement the Jones Act with a judicially created

maritime wrongful death action would contravene Congress's will as interpreted by this Court.

Uniformity with respect to all death claims within the admiralty jurisdiction cannot be achieved in view of varying legislative schemes applicable to seamen, longshoremen and harbor workers, and others within the admiralty jurisdiction. It is, however, possible and desirable to maintain uniformity and consistency *within* the class of seamen. Should this Court determine that the general maritime law can supplement Jones Act remedies in death cases, uniformity and integrity of remedies within the class of seamen mandate that beneficiaries be limited to recovery of pecuniary damages only, whether liability is predicated upon negligence or unseaworthiness.

If this Court determines that loss of society damages under the general maritime law are available to beneficiaries of Jones Act seamen in death cases, recovery of such damages should be limited to the decedent's *dependents* to afford some degree of consistency and integrity within the class of seamen.

The Jones Act and DOHSA were enacted to provide for the *dependents* of the deceased. Although neither the Jones Act nor DOHSA specifically set forth that the potential beneficiaries of those actions, spouse, child, or parent, need be "dependent" on the deceased, this requirement is written into the statutes since damages for wrongful

death are expressly limited to pecuniary loss. This Court consistently has recognized that the purpose of Congress in enacting FELA was to provide a right of action for relatives dependent upon the employee. *Vreeland*, 227 U.S. at 68; *Gulf, C.& S.F.R. Co. v. McGinnis*, 228 U.S. 173 (1913). In *Moragne* and *Gaudet*, this Court, in creating and clarifying the maritime wrongful death action, clearly demonstrated its adherence to Congressional intent in its repeated references to the "dependents" of the deceased. Such references were not mere coincidence.

The twin aims of admiralty, establishing uniformity within the admiralty jurisdiction and providing special solicitude to seamen, also counsel against permitting non-dependents to recover loss of society damages. As wrongful death beneficiaries under the Jones Act must establish pecuniary loss to recover, uniformity is promoted by limiting recovery of loss of society damages to those who can establish dependency. In addition, to the extent the "special solicitude" aim of admiralty is designed to promote merchant shipping in part by assuring seamen of the care of their dependents in the event of the seaman's death, such aim has no relevance to this case as petitioner was not dependent on her seaman son. To the extent the "special solicitude" aim of admiralty pertains to the seaman's peace of mind, unless it refers to assurances that the seaman's surviving dependents are cared for financially, it cannot be achieved prior to the outset of the voyage given the unknowns faced at sea.

Without a rational limitation on the number of relatives who could assert a loss of society claim, the more difficult it is to estimate and insure against the risk of liability, weakening the justification for imposing liability for unseaworthiness, a species of liability without fault. Limiting recovery to dependents creates a finite, determinable, class of beneficiaries and "allows recovery for those with whom the creation or the wrongful death action was concerned: a seaman's dependents." *Miles v. Melrose*, 882 F.2d 976, 989 (5th Cir. 1989).

ARGUMENT

I. THIS COURT'S DECISION SHOULD ADVANCE ITS LONGSTANDING POLICY OF INTEGRATING THE JUDGE-MADE LAW WITH THE STATUTE BY WHICH CONGRESS OCCUPIED THE FIELD OF SEAMEN'S INJURIES AND DEATHS.

The law of seamen is a unique mixture of customary and statutory law. Nothing similar is found elsewhere today in the maritime law. An old body of customary law was recognized and articulated by this Court, as the basis of rights to maintenance, cure and unearned wages and recovery of damages for non-fatal injuries caused by unseaworthiness. A seaman was not allowed to recover against his employer on the basis of the negligence of the master or crew. *The OSCEOLA*, 189 U.S. 158, 23 S.Ct. 483 (1903). There was no wrongful death or survival action recognized under the maritime law. *The HARRISBURG*, 119

U.S. 199, 7 S.Ct. 140 (1886); *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 53 S.Ct. 173 (1932). Congress eventually entered and occupied the field with the Jones Act, 46 U.S.C. §688, by which it preserved the then existing law which allowed recovery for unseaworthiness and supplemented it with a right to damages against the employer for non-fatal injury based on negligence, provided a right to specified damages for wrongful death for specified beneficiaries based on negligence, and established a limited survival action providing certain damages, again for specified beneficiaries, based on negligence.

The policy of Congress in filling what it considered the gaps in seamen's compensation is entitled to deference. This Court has, over many years, displayed that deference in decisions which were necessary to elucidate the relationships between prior law and the Jones Act together with the Court's earlier interpretations of some of the Act's incorporated provisions as applied to railroad workers. This Court has conspicuously and rightly followed a policy of reconciling and integrating the judge-made law with the Congressional will expressed in the Act. A number of the cases cited below on specific points exemplify this continuous, explicit concern of the Court.

The Court's policy in this area has been a sound one, promoting, so far as possible, a rational, predictable scheme, uniform within itself, and free of capricious differences of treatment based on alternative reference to the

statutory or judge-made law consistent with the expressed will of Congress. There is every reason why such a policy should be continued rather than changed.

References by petitioner Miles to a desirable uniformity of maritime law are misleading. The adoption by Congress of very different regimes for seamen and longshoremen makes uniformity of doctrine and treatment across the board impossible. What can and should be sought are uniformity and integrity of treatment within a class of workers subject to a particular scheme of compensation to the extent that such is not violative of Congressional will. The general maritime law, on which longshoremen's actions are based, is primarily a creature of judicial balancing of competing ideas. Contrarily, the Jones Act, on which seamen's actions for death are based, is a creature of legislative will in which "Congress has struck the balance for us." See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232, 106 S.Ct. 2485, 2499 (1986), quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 623, 98 S.Ct. 2010, 2014 (1978). The citation of longshoremen's cases in the attempt to produce a coincidence of treatment between longshoremen and seamen, at the expense of integrity within the seamen's law and Congressional intent, is inappropriate.

II. THERE IS NO SURVIVAL ACTION FOR LOSS OF A SEAMAN'S FUTURE EARNINGS

A. This Court Has Held There is no General Maritime Law Survival Action. There is No Need to Create One Now.

Petitioner Miles contends an estate, under a general maritime law survival action, is entitled to a decedent's future economic loss. Before reaching this issue however, this Court must determine if there should be a survival action under the general maritime law at all.

Although there have been efforts to confuse the distinction between a survival action and a wrongful death action by those seeking to expand elements of recoverable damages beyond their rational extent, this Court consistently has delineated the logical and historical distinction. Survival damages represent losses the decedent suffered during his lifetime, the right of action for which survives his death. Wrongful death damages represent losses sustained by the decedent's beneficiaries which they suffered as a result of the decedent's death. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 576 n. 2, 94 S.Ct. 806, 810 n. 2 (1974). See also *Michigan C.R. Co. v. Vreeland*, 227 U.S. 59, 67-68, 33 S.Ct. 192, 194-95 (1913); W. Keeton, D. Dobbs, R. Keeton and D. Owen, *Prosser and Keeton on Torts* 942-945 (5th ed. 1984).

This Court has accepted this distinction, particularly in the context of the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-59, incorporated by the Jones Act, 46 U.S.C. §688. *St. Louis Iron Mt. & So. Ry. Co. v. Craft*, 237 U.S. 648, 658, 35 S.Ct. 704, 706 (1915). See *Van Beeck*

v. Sabine Towing, Co., 300 U.S. 342, 347, 57 S.Ct. 452, 454 (1937) (applying the reasoning of *Craft* in a Jones Act case).

The need for a general maritime law wrongful death action for others than Jones Act seamen was explained in detail in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 385, 90 S.Ct. 1772 (1970), which "created a true wrongful-death remedy -- founded upon the death itself and independent of any action the decedent may have had for his own personal injuries." *Gaudet*, 414 U.S. at 578, 94 S.Ct. at 811. The essence of *Moragne* is that it had become unconscionable to deny dependents of a decedent their *own personal loss* resulting from wrongful death of the decedent.

Contrarily, because a survival action concerns losses suffered by the decedent prior to his death, the actual party sustaining the loss can never receive compensation for that loss. Thus, survival damages are a "windfall" to the decedent's survivors. As one commentator has suggested:

> Such a decision [to continue the maritime law proscription against survival remedies] arguably would do no violence to the policies which should dictate the path of maritime tort law. It is one thing to say that the beneficiaries of a person killed in maritime employment can recover nothing; it is quite another to say that those beneficiaries cannot recover, in addition to the damages which they have sustained as a result of the death,

> the "windfall" of the damages the victim could have recovered if he had lived. A remedy for the former may be necessary to encourage maritime employment; a remedy for the latter seemingly would have little bearing on that policy.

Maraist, *Maritime Wrongful Death* -- Higginbotham *Reverses Trend and Creates New Questions*, 39 La. L. Rev. 81, 92 (1978). See also Prosser, *supra*, at 942.

An often expressed justification for expanding remedies and damages available to seamen is to promote maritime employment and the special solicitude owed seamen because of seamen's status as "wards of the court" due to the historical hardships of their profession. Although these objectives may be laudable, their overuse as a justification for expansion of remedies and damages can be shortsighted. For maritime employment to be encouraged, there must be United States flag shipowners to employ the seamen. Continual expansion of remedies and damages recoverable by seamen discourages the operation of United States flag vessels and decreases the jobs available for this historically important class of citizens. Moreover, the traditional justification for considering seamen as wards of the court has been vitiated by the advent of unions, global communication and rapid worldwide transportation.

While acknowledging the distinction between wrongful death and survival actions, several district and appellate courts, in violation of the principle of *stare decisis*, have posited the existence of a general maritime law survival action. These cases generally ignored the decisions of this Court which specifically held there is no general maritime law survival action. *Cortes*, 287 U.S. at 370-371, 53 S.Ct. at 174. See also *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 157, 85 S.Ct. 308, 313 (1964) (After the death of a seaman, his cause of action for unseaworthiness "would not survive under the general maritime law.").

In one of the few cases acknowledging the existence of a maritime survival action which addresses *Cortes*, the First Circuit described *Cortes*' conclusion that the maritime law does not provide a survival action as dictum and, in any event, no longer good law after *Moragne*. *Barbe v. Drummond*, 507 F.2d 794, 800 n. 6 (1st Cir. 1974) (death of a *passenger* on the high seas).

The *Cortes* language *was not* dictum, as this Court specifically held there was no action under the general maritime law which survived the death of seamen. Therefore, the *Cortes* decision necessarily would turn upon the extent the Jones Act changed this rule. Moreover, if there were a general maritime law survival action, the damages allowed, arguably, could be greater than those allowed under the Jones Act. Hence, its existence, *vel non*, was necessary to the case.

Courts following *Barbe* argue, in essence, that *Moragne* overruled *Cortes* and *Gillespie, sub silentio*. However, as stated, the considerations for creating a general maritime law wrongful death action are significantly different from those pertaining to a survival action. *Moragne*, which pertains only to a wrongful death action, does not overrule *Cortes* and *Gillespie*. Prior precedent of this Court clearly demonstrates there is no general maritime law survival action, and there is no compelling reason to create one, as *Moragne* has not affected the holding of *Cortes* and *Gillespie*. A general maritime law survival action should not now be created.

B. The Jones Act Would in any Event Preempt A General Maritime Law Survival Action's Application in the Case of the Death of a Seaman.

The Jones Act is divided into two sections: (1) a right of action based upon negligence for the non-fatal injury of a seaman; and (2) a right of action based upon negligence in the event of the fatal injury of the seaman. FELA, as it is incorporated into the Jones Act, further breaks down the right of action in the event of a fatal accident into: (1) an action based upon negligence resulting in the wrongful death of a seaman allowing designated beneficiaries to recover for their own losses; and (2) an action based upon negligence resulting in the injury and subsequent death of a seaman allowing designated beneficiaries to recover damages

sustained by the seaman between the time of his injury and his death -- a survival action.

In drafting the Jones Act, Congress was well aware of the existence of an action for unseaworthiness as described in *The OSCEOLA, supra*, and the absence of general maritime law wrongful death and survival actions. Significantly, the phrase "at his election" is found in the section pertaining to a seaman's action for non-fatal injury, which has been interpreted to allow a seaman to prosecute simultaneously actions based on negligence under the Jones Act (an action for damages at law) *and* strict liability under the doctrine of unseaworthiness (an action for damages in admiralty). Importantly, the phrase "at his election" is *not* found in the wrongful death and survival action section of the Jones Act. This intentional omission led this Court to conclude that Congress granted seamen a right of action based upon negligence as well as unseaworthiness in a non-fatal injury, but for his survivors to have only an action based upon negligence in the event of the deaths of the seamen. *Lindgren v. United States*, 281 U.S. 38, 50 S.Ct. 207 (1930). Although *Lindgren* was a wrongful death case, its reasoning pertaining to statutory construction certainly should apply with equal weight to a survival action as the enabling provision of the Jones Act is identical.

While the decision of Congress not to allow a Jones Act seaman's survivors a recovery for unseaworthiness in a death case may seem harsh, against the backdrop of the

featherweight burden of proof of negligence applied in Jones Act cases, the balance struck by Congress between the rights of a seaman's *dependents* and the liabilities of an employer is reasonable.

C. Any Award Under a General Maritime Law Survival Action Must be Limited to Those Damages Established by Decisions Interpreting Congressional Intent in FELA and the Jones Act.

Petitioner would have this Court allow decedent's estate to recover decedent's future economic loss under a newly created maritime survival action. This contention violates the will of Congress.

FELA, adopted by Congress on April 22, 1908, contained only a provision for an employee to recover damages for injuries caused by his employer's negligence. In the event of his death, his designated relatives could recover the pecuniary loss which *they* sustained as a result of that death. There was no survival action in the initial legislation. See *Craft*, 237 U.S. at 656, 35 S.Ct. at 705.

FELA was amended on April 5, 1910, to allow, in addition to a wrongful death remedy, a survival action. As explained by this Court, the addition of the survival action with its specified damages was a well considered expression of Congressional will:

> Brought into the act by way of amendment, this provision [the survival action] expresses the *deliberate will* of Congress. Its terms are *direct, evidently carefully chosen*, and should be given effect accordingly. . . . [The survival provision] means that the right existing in the injured person at his death -- a right covering his loss and suffering while he lived, *but taking no account* of his premature death or of *what he would have earned* or accomplished in the *natural span of his life* -- shall survive to his personal representative to the end that it might be enforced and the proceeds paid to the relatives indicated. (Emphasis added.)

Craft, 237 U.S. at 657-658, 35 S.Ct. at 706.

The Jones Act, enacted by Congress on June 5, 1920, against the backdrop of *Craft's* interpretation of FELA, made the remedies in FELA applicable to actions by those who would come to be called "Jones Act" seamen. As Congress is presumed to know the law, it is clear the interpretation of FELA and Congressional intent found in *Craft* was accepted by Congress in incorporating FELA into the Jones Act. See *DoCarmo v. F. V. Pilgrim I. Corp.*, 612 F.2d 11, 13-14 n. 3 (6th Cir. 1979) and *Tallentire*, 477 U.S. at 228, 106 S.Ct. at 2497, citing *Cannon v. University of Chicago*, 441 U.S. 677, 696-697, 99 S.Ct. 1946, 1957-1958 (1979) ("It is

always appropriate to assume that our elected representatives, like other citizens, know the law.").

The same reasoning that compelled this Court in *Higginbotham* to limit damages recoverable by a decedent's survivors to those damages specifically authorized by the applicable federal statute applies with equal force in this instance. In *Higginbotham*, this Court instructed:

> DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy, both because of the interest in *uniformity* and because *Congress' considered judgment* has great force in its own right. . . .
>
> Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements. . . . There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. (Emphasis added.)

Higginbotham, 436 U.S. at 624, 625, 98 S.Ct. at 2014, 2015.

Seventy years of judicial interpretation have held that Congress clearly limited Jones Act beneficiaries' rights under the survival section of that statute to recovery of the decedent's loss and pain and suffering while he lived, and did

not provide for recovery for his premature death or what he would have earned or accomplished in his natural life span. The courts should not now by judicial remedy seek to provide what Congress has denied. See *DoCarmo*, 612 F.2d at 13 and cases cited therein.

D. Uniformity, the Weight of Jurisprudence and the Statutory Law of the States as a Whole Require That any Damages Recoverable Under a General Maritime Law Survival Action be Limited to Those Allowed by the Jones Act.

Awarding the estate the decedent's future lost wages defies logic, offends interests of uniformity and is not warranted by the weight of the jurisprudence or statutory authority.

Petitioner cites two cases in support of the proposition that the decedent's estate should recover the decedent's future lost earnings. The first is a district court case in which the trial judge applied the survival statute of the State of Washington (under the convenient guise of describing it as the general maritime law). *Muirhead v. Pacific Inland Navigation*, 378 F.Supp 361 (W.D. Wa. 1974). The second is a decision from the Ninth Circuit, *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987), which for jurisprudential support cites only *Muirhead* and *Kriesak v. Crowe*, 36 F.Supp. 127 (M.D. Pa. 1940) (an automobile death case governed by a Pennsylvania statute). *Evich*'s entire analysis of the issues is contained in

one unconvincing paragraph which sounds more like an apology than a persuasive argument. In pertinent part the paragraph reads:

> While the majority of states do not allow future economic loss to be recovered in a survival actions, and the Jones Act provides for no such recovery, we find recovery here "better becomes the humane and liberal character of proceedings in admiralty." *Moragne*, 398 U.S. at 387, 90 S.Ct. at 1780 (citation omitted) and prevents the anomaly of rewarding a petitioner for killing his victim rather than injuring him. See *Id.*, at 395, 90 S.Ct. at 1784. Most states and the Jones Act allow these damages to be recovered in the form of loss of support when wrongful death beneficiaries exist.

Evich, 819 F.2d at 258.

The Fifth Circuit in *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989), *reh'g. denied*, 888 F.2d 1388 (1989), correctly rejected the reasoning advanced in *Evich*. While acknowledging that the humane and liberal character of admiralty proceedings influences the development of admiralty jurisprudence, the Fifth Circuit recognized that courts nevertheless are not empowered to create causes of action whenever they see fit. *Moragne* established a maritime wrongful death action not merely because it was humane, but rather

because, beyond the significance of particular statutes, every state, the Jones Act and DOHSA had recognized such an action so that actions for wrongful death had become a part of the national consciousness. *Miles*, 882 F.2d at 986-987. In contrast, as admitted by the Ninth Circuit panel in *Evich*, most state survival statutes and the Jones Act do not allow recovery for future lost wages. *Evich*, 819 F.2d at 258; *Miles*, 882 F.2d at 987.

The Ninth Circuit panel, in language seized upon by petitioner, next attempts to support its position by stating that it "prevents the anomaly of rewarding a petitioner for killing his victim rather than injuring him[.]" *Evich*, 819 F.2d at 258. This argument is as absurd as it is offensive. It suggests a vessel owner would intentionally devise accidents or create conditions in which seamen would be killed rather than merely injured. Were a vessel owner intentionally to kill a seaman rather than injure him, the proper redress is within the criminal law system, not awarding an estate future lost wages. Reward and punishment in the civil context make sense only, if ever, when the reward or punishment encourage proper behavior or deter improper actions. Moreover, *Evich* damages are punitive rather than compensatory because they do not compensate anyone for an actual loss. Rather, they eliminate a nonexistent "reward for killing" by providing a punishment. *Complaint of Cambria S.S. Co.*, 505 F.2d 517, 522 (6th Cir. 1974), *cert. denied*, 420 U.S. 975 (1975) ("fundamentally punitive approach is inconsistent with the expressed compensatory philosophy of the maritime law").

Evich notes: "Most states and the Jones Act allow these damages to be recovered in the form of loss of support when wrongful death beneficiaries exist." 819 F.2d at 258. This is not an accurate statement. The damages allowed by the Jones Act and most states are the *loss of support* to the wrongful death beneficiaries, not the wholesale recovery of future income by an inanimate estate which suffered no loss of support. In virtually every case the two figures would not be remotely similar. Moreover, as the Fifth Circuit correctly stated:

> Evich erroneously equates a policy of supporting dependents with one of making an estate whole for the loss of future earning capacity.

Miles, 882 F.2d at 986. The Sixth Circuit, in reasoning similar to that of the court below, has stated:

> [T]he liberal and humanitarian character of maritime proceedings as expressed in *Moragne* and *Gaudet* contemplates solicitude for dependents, not inanimate estates.

Complaint of Cambria S.S. Co., 505 F.2d at 523.

As the *Evich* decision proves, attempting to support the extension of damages to future lost wages can only be done by an illogical blurring of the elements of survival and wrongful death actions. Recovery of future loss

of income by the estate is not a survival item of damage, as this item of damage does not accrue during the decedent's lifetime to *survive his death* and pass on to the estate. It is not a wrongful death item of damage because it is not a personal loss sustained by a beneficiary. There is no basis to award future lost wages to an inanimate estate, except by fiat.

Some state legislatures, by fiat, have illogically blurred these concepts. However, if a rational, predictable, controllable general maritime law survival action is to be established, the damages allowable under that action must be based on logic, not the rejection of such. See Nagy, *The General Maritime Law Survival Action: What are the Elements of Recoverable Damages?*, 9 U. Haw. L. Rev. 5, 79-82 (1987) (concluding that the logical scope of damages should exclude an award of future lost income to the estate).

Because the Jones Act represents the exclusive means of recovery sounding in negligence for a seaman, a general maritime law survival action, if it applies to seamen, necessarily must be based upon the doctrine of unseaworthiness, a species of liability without fault. It indeed would be an anomaly to award additional and expanded damages against a party which is liable *without* fault as suggested by *Evich*.

As noted in *Miles*, 882 F.2d at 987, uniformity in maritime law is not served by allowing recovery of the dece-

dent's lost wages under a general maritime law survival action as the Jones Act does not permit such recovery -- if in fact a seaman's beneficiaries even have a maritime survival action in addition to their Jones Act remedy.

If *Evich* were accepted, the interests of uniformity would not be served. For the first time in seamen's cases, the *parties* entitled to recover could differ substantially depending on whether the basis of recovery was unseaworthiness (the heirs of the estate), negligence (the Jones Act beneficiaries) or both (the heirs of the estate for some items, the Jones Act beneficiaries for others).

As seventy years of decisions have held, Congress expressly considered the survival damages to be recovered by the beneficiaries of a Jones Act seaman. Thus, an award under any newly created general maritime law survival action must be limited to those damages which accrued to and thus survive the decedent as established by the will of Congress. This Court has held that Congress excluded awards of future lost wages in the Jones Act survival action. Applying this same exclusion to any general maritime law survival action is supported by logic, the interest of uniformity, the weight of jurisprudence and the statutory law of the states.

III. DAMAGES FOR LOSS OF SOCIETY CANNOT BE RECOVERED BY NONDEPENDENTS

A. As Congress has Preempted the Field with Respect to Seamen, the General Maritime Law Cannot Supplement the Jones Act Pecuniary Damage Limitation in Death Actions.

1. By Statute and Supreme Court Precedent, Beneficiaries of Jones Act Seamen are Limited to Recovery of Pecuniary Losses in Wrongful Death Cases.

In contrast to the survival action described above, an action for wrongful death is intended to compensate survivors for *their* losses resulting from the decedent's death. In *Moragne*, this Court held "that an action does lie under general maritime law for death caused by violation of maritime duties." *Moragne*, 398 U.S. at 409, 90 S.Ct. at 1792.

Following *Moragne*, the appellate courts, mindful of the limitations on damage recovery manifested in federal statutory and decisional law, generally denied beneficiaries of *seamen* recovery for non-pecuniary elements of damages under the maritime wrongful death action. See, for example, *Petition of M/V ELAINE JONES*, 480 F.2d 11, 29-34 (5th Cir. 1973), *modified*, 513 F.2d 911 (5th Cir. 1975), *cert. denied*, 423 U.S. 840 (1975); *Petition of United States Steel Corporation*, 436 F.2d 1256, 1278 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971). See generally, Engerrand & Brann, *Troubled Waters for Seamen's Wrongful Death Actions*, 12 J.

Mar. L. & Com., 327, 338-39 (1981) (hereinafter referred to as Engerrand and Brann).

Gaudet then provided the forum for further shaping of the maritime wrongful death action for beneficiaries of *longshoremen* by clarifying, among other items, recoverable elements of damages. In *Gaudet*, a scant majority of this Court, in a marked departure from established maritime law, established a right of recovery of loss of society damages in a longshoreman's maritime wrongful death action. A vigorous dissent disputed the propriety of permitting recovery of loss of society damages in part because permitting such recovery represented a "repudiation of the congressional purposes expressed in the two federal maritime wrongful-death statutes [the Jones Act and DOHSA]." *Gaudet*, 414 U.S. at 605, 94 S.Ct. at 825.

Indeed, as has long been clear, FELA (and consequently, the Jones Act) provides for recovery in its wrongful death aspect only of *pecuniary* damages. *Vreeland*, 227 U.S. at 68, 70-73, 33 S.Ct. at 195, 196-97; *Craft*, 237 U.S. at 659, 35 S.Ct. at 705; *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 493, 100 S.Ct. 755, 757 (1980). Recovery for damages under DOHSA also is limited to the pecuniary loss sustained by the decedent's beneficiaries. 46 U.S.C. §762.

Four years after *Gaudet*, this Court, in *Higginbotham*, had to determine whether the beneficiaries of a *passenger* killed in a helicopter on the high seas could recover

Gaudet loss of society damages or were limited to pecuniary damages as set forth in DOHSA. When confronted with a choice between "the rule chosen by Congress in 1920 [DOHSA] or the rule chosen by this Court in *Gaudet*," 436 U.S. at 623, 98 S.Ct. at 2014, this Court held that survivors of a decedent whose death occurred on the high seas could not recover loss of society damages under the general maritime law as Congress, in enacting DOHSA, had expressly limited survivors' recovery to their pecuniary losses. The rationale in *Higginbotham* for not expanding remedies applies more so in the case of seamen whose rights have been closely regulated by Congress.

2. As Congress Has Preempted the Field with Respect to Seamen, The General Maritime Law Wrongful Death Action Cannot Supplement Statutory Death Actions.

Whether *Gaudet* impacts the rights of *seamen* or their beneficiaries is squarely before this Court for the first time as there is no case wherein this Court has awarded loss of society to a seaman's dependents. Of critical significance is that both *Moragne* and *Gaudet* involved *longshoremen*, whose rights are not governed by the Jones Act.

That the courts must defer to the will of Congress when Congress has spoken to an issue is clear. In *Lindgren*, which involved the death of a seaman in territorial waters, this Court noted the "long settled rule" that Congress, in enacting the FELA, preempted the field of employers'

liability to employees covered by the Act, and specifically concluded that "as [the Jones Act] covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject." 281 U.S. at 46-47, 50 S.Ct. at 211. The unanimous opinion went on to state that in death actions recovery could not be based on unseaworthiness. In explaining its conclusion, this Court noted that the reference to the phrase "at his election" in the Jones Act referred to the seaman's election, in the event of a non-fatal injury, to proceed under negligence or unseaworthiness. 281 U.S. at 47-48, 50 S.Ct. at 211. As those words were omitted from the second clause of the Jones Act relating to the right of the personal representative to recover damages for the seaman's death based on negligence, this Court concluded that seamen's beneficiaries could not recover damages based on unseaworthiness. 281 U.S. at 48, 50 S.Ct. at 211.

Thirty-four years later, this Court, in *Gillespie*, met the same issues it confronted in *Lindgren*. In *Gillespie*, a seaman fell from a vessel docked in Ohio and drowned. The decedent's personal representative urged this Court to overturn *Lindgren* to the extent it denied any recovery based on unseaworthiness. This Court declined and specifically reaffirmed the correctness of *Lindgren*, noting that Congress had let the Jones Act stand for thirty-four years with the *Lindgren* Court's interpretation. Acknowledging its special responsibility in maritime matters, this Court nevertheless concluded it should not disturb "the settled plan of rights and

liabilities established by the Jones Act." 379 U.S. at 155, 85 S.Ct. at 312-13. Now, sixty years after *Lindgren*, Congress still has not so amended the Jones Act; this Court's reasoning and interpretation of Congressional will in *Lindgren* and *Gillespie* maintain their vitality.

In view of Congress' intent fully to regulate seamen's actions and the courts' obligation to defer to the will of Congress, the courts should not eviscerate the manifestation of Congress' will, here, the Jones Act, by creating judicial remedies which expand the remedies provided by Congress. Clearly, Congress, which was well aware of an injured seaman's unseaworthiness remedy under the general maritime law, did not limit beneficiaries of those seamen solely to a negligence remedy in death cases in order to encourage the judicial creation of an unseaworthiness remedy.

In footnote 12 of *Moragne*, this Court discussed the preclusive effect of the Jones Act as discussed in *Lindgren* and *Gillespie*. Respondents emphasize that this discussion was *obiter dictum* as *Moragne* involved the death of a longshoreman not cov[redacted] by the Jones Act; hence, that legislation was not applicable to *Moragne*. This Court commented that there was no question of preclusion of a *federal* remedy in *Gillespie* and *Lindgren* "since no such remedy was thought to exist at the time those cases were decided." 398 U.S. at 396 n. 12, 90 S.Ct. at 1785 n. 12. However, there was a well established federal remedy, specifically, an action for unseaworthiness. That there was no

cause of action for wrongful death based upon unseaworthiness at the time the *Lindgren* and *Gillespie* decisions were rendered is not determinative as this Court could have created such an action for seamen then, as it later did for longshoremen in *Moragne*, had it felt such appropriate. However, no such attempt to create such an action was considered by this Court in *Lindgren* or *Gillespie* as the Jones Act remedy was held to be exclusive. As this Court later stated:

> In *Lindgren v. United States*, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 686, the Court held that the Jones Act remedy for wrongful death was exclusive and precluded any remedy for wrongful death within territorial waters based on unseaworthiness, whether derived from federal or state law.

Kernan v. American Dredging Company, 355 U.S. 426, 429-430, 78 S.Ct. 394, 396-397 (1958). The Court then declined to create a general maritime law remedy supplementing the Jones Act.

Moreover, this Court, in *Moragne*, did not address the clear conclusion in *Lindgren* that Congress, in enacting the Jones Act, had occupied the field with respect to seamen's actions against their employers and had allowed the unseaworthiness remedy to supplement the Jones Act only in the event of a non-fatal injury, at the seaman's election.

In *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S.Ct. 1673 (1980), this Court allowed the wife of an injured *longshoreman* to maintain her claim under the general maritime law for loss of society resulting from her husband's non-fatal injury. In so ruling, this Court correctly stated, "[T]he Jones Act does not exhaustively or exclusively regulate longshoremen's remedies[.]" *Alvez*, 446 U.S. at 282-83, 100 S.Ct. at 1678. In fact, the Jones Act does not regulate longshoremen's remedies at all. However, this Court's *obiter dictum*, citing *Moragne* for the proposition that the Jones Act is not preclusive even as to true seamen, and that this Court has permitted dependents of seamen killed within territorial waters to recover for violation of a duty of seaworthiness, *Alvez*, 446 U.S. at 283, 100 S.Ct. at 1678, is not accurate. Engerrand & Brann, *supra*, 12 J. Mar. L. & Com. at 344. Those commentators correctly note:

> [T]he Supreme Court in *Lindgren* and *Gillespie* had specifically repudiated any unseaworthiness recovery in the case of death of a seaman in territorial waters, and neither *Moragne*, cited by the Court for authority, nor any other case decided by the Supreme Court to date has granted a wrongful death remedy for unseaworthiness to the personal representative of a seamen killed in territorial waters.

3. Uniformity and Logic Mandate Consistency in Recoverable Damages Available to Seamen and their Beneficiaries Under the Jones Act and the General Maritime Law.

Whether seamen may supplement Jones Act wrongful death remedies with remedies available under the general maritime law has practical significance if the fact finder at trial determines that unseaworthiness is the sole basis of liability, or if recoverable items of damages under the Jones Act versus general maritime law differ. In this case, liability is based both on Jones Act negligence and unseaworthiness. Thus, preemption becomes an issue only if damages recoverable by a seaman's dependents under an unseaworthiness count include loss of society damages.

This Court has never sanctioned an award of loss of society damages in a case involving a Jones Act seaman. The Jones Act and DOHSA, the two Congressional acts under which the beneficiaries of decedents are entitled to recover damages in a maritime setting, provide the most useful guidelines for determining the particular items of damages recoverable in a maritime wrongful death action. Recovery under DOHSA is predicated upon a finding of negligence or, as some courts have held, no-fault theories of liability. *Soileau v. Nicklos Drilling Co.*, 302 F.Supp. 119 (W.D. La. 1979); *Chermesino v. Vessel Judith Lee Rose, Inc.*, 211 F.Supp. 36 (D. Mass. 1962), *aff'd*, 317 F.2d 927 (1st Cir. 1963), *cert. denied*, 375 U.S. 931 (1963). The Jones Act, on the other hand, specifically requires a finding of negligence.

Since both of these acts limit recovery to pecuniary damages in wrongful death actions, logic dictates that the beneficiaries of a deceased seaman should not recover additional and greater damages when their claim is based upon unseaworthiness, a "species of liability without fault," *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94, 66 S.Ct. 872, 877 (1946), than when positive fault must be proved -- under the Jones Act.

Uniformity with respect to all death claims within the admiralty jurisdiction cannot be achieved since Congress has legislated differently with respect to specified classes of individuals falling within the admiralty jurisdiction. Seamen have the Jones Act, longshoremen and harbor workers have the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §901, *et seq.*, (which continues general maritime law remedies for longshoremen, except recovery for unseaworthiness), and those suffering death on the high seas have DOHSA. It is, however, both possible and desirable to maintain uniformity and consistency *within* those separate classes. Limiting recovery for wrongful death to pecuniary damages under the general maritime law in unseaworthiness cases promotes uniformity within the class of seamen as such limitation applies in the case of a finding of Jones Act negligence. Furthermore, an award of loss of society damages should not be a fortuitous bonus because the seaman's death occurred in territorial waters and as a result of unseaworthiness when Congress has denied such damages under both DOHSA and the Jones Act.

Neither *Moragne* nor *Gaudet* counsel against such a result as both involved deaths of longshoremen, not seamen. The only extent *Moragne*, if applicable, could impact seamen would be by establishing a wrongful death remedy based on unseaworthiness, eliminating the resort the borrowing of state wrongful death remedies when a seaman's death caused by unseaworthiness occurrs in territorial waters. As Jones Act negligence and unseaworthiness have been held to be simply alternative grounds of recovery for a single cause of action, *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 319-21, 47 S.Ct. 600, 602 (1927); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225, 78 S.Ct. 1201, 1204 (1958), there is no justification for a different measure of recovery depending on whether the ground for recovery is unseaworthiness or negligence.

Accordingly, respondents submit the petitioner is not entitled to loss of society damages whether or not she was dependent upon the decedent. Uniformity requires that seamen's beneficiaries are entitled to recover as wrongful death damages only pecuniary damages under both the Jones Act and, if it is available as a remedy, the general maritime law.

B. Even if Loss of Society Damages are Available to Seamen's Beneficiaries, the Policies Implicit in Statutory and Decisional Law Require that Such Recovery be Limited to Dependents of the Decedent.

In *Gaudet*, this Court, in setting forth the items of damages to which a longshoreman's beneficiaries are entitled under the general maritime law, stated:

> [U]nder the maritime-wrongful death remedy, the decedent's *dependents* may recover damages for their loss of support, services, and *society*, as well as funeral expenses. (Emphasis added.)

414 U.S. at 584; 94 S.Ct. at 814.

In the case at bar, petitioner Miles, nondependent parent of the deceased, suggests the numerous references to "dependents" in *Moragne* and *Gaudet* (the word "dependent(s)" is used some twenty-seven times in *Gaudet*), should not be taken literally since such references were meant to refer to the obvious dependency of the wives of those deceased longshoremen. For the reasons set forth below, respondents submit petitioner's contentions do not bear scrutiny.

1. Maritime Wrongful Death Statutes, Which Provide Guidelines for any Maritime Law Wrongful Death Action, Were Enacted to Provide for the Decedent's Dependents.

As discussed above, DOHSA and the Jones Act provide the most useful guidelines for determining the parameters of maritime wrongful death actions. The potential beneficiaries under DOHSA include any or all of the following: spouse, parent, child, or dependent relative. 46 U.S.C. §761. DOHSA does not specifically state that only dependent spouse, children, or parents of the decedent are proper beneficiaries. The word "dependent" modifies only the word "relative." Similarly, in the Jones Act, the word "dependent" modifies the phrase "next of kin." Based on this language, petitioner argues the beneficiaries in a maritime wrongful death action, who are analogous to those listed in the pertinent federal statutes, should be entitled to recover loss of society damages regardless of their dependence upon the decedent at the time of the death.

A similar position was taken by the parents of the decedent in *Anderson v. Whittaker Corporation*, 894 F.2d 804 (6th Cir. 1990). The Sixth Circuit quoted with approval the lower court's reasoning denying the nondependent parents the right to recover loss of society damages:

> [P]laintiffs, in making this argument, advocate that [the court] adopt language from either statute without reference to how that language fits into

> each statute as a whole. In DOHSA, for example, although the statute explicitly speaks in terms of damages for the benefit of "decedent's wife, husband, parent, child, or dependent relative," the requirement of dependence is written into the statute, insofar as damages are expressly limited to "pecuniary loss." Damages under the Jones Act, similarly, are limited to the sort of pecuniary losses that only dependents are likely to suffer. Each statute, therefore, sets up a scheme where *dependents* are protected, to the exclusion of other persons who may conceivably have suffered injury.

Anderson, 894 F.2d at 812 n.8.

The reasoning of the court below in *Miles* and of the Sixth Circuit in *Anderson*, that loss of society damages are recoverable only by the decedent's dependents, conforms not only to the clear language in *Gaudet*, but also to the policies addressed by Congress in enacting the Jones Act (and FELA) and DOHSA to provide support for the decedent's dependents. In discussing Congressional intent expressed in the FELA, this Court stated years ago:

> The obvious purpose of Congress was to save a right of action for certain relatives *dependent* upon an employee wrongfully injured for the loss and

> damage resulting to them financially by reason of the wrongful death.

Vreeland, 227 U.S. at 68, 33 S.Ct. at 195. See also *McGinnis*, 228 U.S. 173, 33 S.Ct. 426 (judgment in FELA case in favor of a widow and three children; a fourth adult child who was married and resided with and was maintained by her husband would not be allowed recovery absent of showing of pecuniary loss). In G. Gilmore & C. Black, *The Law of Admiralty* §6-30 at 361 n. 174 (2d Ed. 1975), the authors note that the concept of dependency cannot be overlooked in DOHSA and FELA death actions "since pecuniary loss to the beneficiary is the basis for recovery[.]"

The statutory list of beneficiaries in FELA, which was incorporated by the Jones Act in 1920, has remained unchanged since enacted in 1908. There is thus no indication that Congress has intended to make the action available to anyone other than the decedent's dependents. In short, Congress has spoken with respect to the appropriate beneficiaries in wrongful death actions and the strong implication is that Congress' intent was to provide for the decedent's dependents only. *Gaudet* clearly demonstrates this Court's agreement.

2. Loss of Society Damages Recoverable Under the Maritime Wrongful Death Action, if Available to Seamen at all, are Limited to Dependents of the Decedent.

As noted above, *Moragne* did not specify the beneficiaries entitled to recover wrongful death damages. But this Court's lengthy discussion of the beneficiaries listed by Congress in maritime related wrongful death statutes, such as the Jones Act and DOHSA, suggests the beneficiaries under *Moragne* certainly cannot be broader than those contemplated by Congress in creating statutory wrongful death actions. Furthermore, there has been no indication by this Court that the goal of protecting the decedent's dependents, evidenced in the Jones Act and DOHSA, should not apply to the judicially created wrongful death action. In *Moragne*, this Court repeatedly referred to the contemplated beneficiaries of the maritime wrongful death action as the "dependents" of the deceased.

Gaudet then clarified (and expanded) *Moragne* by enumerating the elements of damages, including for the first time damages for loss of society, available under this judicially created maritime wrongful death action. Although this Court did not specifically address the issue of appropriate beneficiaries, this Court continued its repeated references to the intended beneficiaries as those "dependent" on the decedent.

The only case petitioner cites as directly supporting her claim that nondependents may recover loss of society, *Cook v. Ross Island Sand & Gravel Co.*, 626 F.2d 746 (9th Cir. 1980), is inapposite. *Cook* did not directly address the issue before this Court, that is, whether wrongful death beneficiaries who are not dependent on the decedent may recover loss of society damages. Although *Cook* noted in footnote 1 and accompanying text that the jury had declined to award damages for the decedent's "physical assistance" to his mother in the operation and maintenance of her business, the jury did award $75,000.00 for, among other things, the deprivation of the decedent's "aid" and "care," apparently pecuniary losses. The jury may have declined to award damages for the decedent's "physical assistance" to his mother as duplicative of aid and/or care. The issue of dependency, as such, was not raised and, therefore, not decided by *Cook*. See *Glod v. American President Lines, Ltd.*, 547 F.Supp. 183 (N.D. Cal. 1982) (recognizing that the issue of whether loss of society damages were available to nondependents had not been addressed by this Court, the Ninth Circuit, or any court within the Ninth Circuit and, noting this Court's emphasis on the right of the decedent's *dependents* to recover loss of society damages, holding that the decedent's nondependent siblings were not entitled to recovery of such damages).

Petitioner's argument that this Court did not mean "dependents" despite twenty-seven such references is without merit. This Court's emphasis on the right of the decedent's "dependents" to recover wrongful death damages was not a

chance reference to a convenient word, as other words were readily available to convey the intent, had there been such, to broaden the class of beneficiaries entitled to recover such damages beyond dependents.

3. Uniformity and Special Solicitude to Seamen, as well as Consistency and Integrity within Admiralty Jurisdiction, are Best Served by Limiting Wrongful Death Action Recoveries Based on Unseaworthiness to Dependents of the Decedent.

As set forth above, recurring themes in the development of maritime law include achieving uniformity within the admiralty jurisdiction and providing "special solicitude" to seamen. *Moragne* expressed these themes and provided a framework for the decision of the court below in *Miles*.

Achieving complete uniformity is not possible given the differing legislative schemes set forth by Congress pertaining to seamen, longshoremen and harbor workers and other individuals on the high seas. Nevertheless, following *Moragne*, an approximation of uniformity seemed possible. The goal of uniformity, however, was thwarted by *Gaudet's* subsequent determination that recoverable damages under the general maritime law included loss of society.[1]

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[1] Much of the problem stems from the amorphous nature of loss of society damages. Were loss of society damages "primarily symbolic" as suggested by this Court in *Higginbotham*, 436 U.S. at

As DOHSA and the Jones Act limit wrongful death damages to pecuniary losses only, anomalies will continue to exist as long as *Gaudet* damages are available under the general maritime law. Should this Court determine that beneficiaries of seamen are entitled to recover loss of society damages in an unseaworthiness action, respondents submit that limiting such recovery to dependents of the seamen will achieve at least a modicum of uniformity. Thus, only those who demonstrate financial dependency and would be entitled to recover damages under the Jones Act, also would be entitled to recover loss of society damages. Those who could not establish dependency would be denied recovery of loss of society damages -- as seems to have been the intent of Congress.

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624 n. 20, 98 S.Ct. at 2014 n. 20, many of the incongruities generated by *Gaudet* would have minor significance. But loss of society damages have become a major focus in many wrongful death cases. Although this Court in *Higginbotham* commented on the propriety of large loss of society awards and suggested the possibility of allowing only awards which are primarily symbolic, there has been no translation of that concern into practice in the twelve years since *Higginbotham*. This Court's footnoted distinction between recoverable loss of society damages and non-recoverable mental anguish and grief damages has been described as "what may be the least convincing footnote (No. 17) in the history of our jurisprudence[.]" G. Gilmore & C. Black, *The Law of Admiralty* §6-33 at 372 (2d Ed. 1975).

The court below, citing its own decision in *Sistrunk v. Circle Bar Drilling Company*, 770 F.2d 455, 459 (5th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986), reached that conclusion, stating "that 'denial of recovery lends more uniformity to admiralty jurisdiction than allowing recovery,' because the parents could not recover loss-of-society damages under either the DOHSA or the Jones Act". *Miles*, 882 F.2d at 988.

The "special solicitude" aim of admiralty also counsels against permitting nondependents to recover loss of society damages. Providing special solicitude to seamen is not intended to be solely a result-oriented concept wherein the courts are obligated to provide special advantages to seamen at every turn. Maintaining the consistency and integrity of the maritime law is of at least equal consequence. The "special solicitude" aim of admiralty is designed to promote merchant shipping in part by assuring seamen of the care of their dependents in the event of the seamen's death. As the court below noted, to the extent that the purpose of providing special solicitude to seamen is to insure the financial support of their survivors, this aim of admiralty has no relevance as the parents in this case were not dependent on their seaman son. *Miles*, 882 F.2d at 988. Although the court below suggested the possibility of the special solicitude aim of admiralty as pertaining to the seaman's or survivors' "peace of mind," respondents submit that "peace of mind," unless it refers to assurances that the seaman's surviving

beneficiaries are cared for financially, cannot be achieved prior to the outset of a voyage given the unknowns faced at sea.

The Fifth Circuit, in both *Miles* and *Sistrunk*, considered as well the approach of state wrongful death statutes. Pointing out the dissimilar situation in *Moragne*, which was born in the context of virtual universal rejection of the common law rule barring recovery in wrongful death actions, the court below concluded state "statutory provisions concerning recovery for loss of society by nondependent parents of a decedent survived by neither spouse nor child are without pattern." *Miles*, 882 F.2d at 988.

That petitioner's claim for loss of society is based on unseaworthiness, a species of liability without fault, properly was of concern to the court below. Pointing out that strict liability, such as unseaworthiness, is based in part on the assumption that defendants are best able to bear and distribute the cost of the risk of injury, the court noted that "the larger and more amorphous the potential class of plaintiffs[,]" the greater the difficulty on the part of defendants to shift losses to the public. Questioning the justification for imposing strict liability in the face of a large and indeterminate number of plaintiffs, the court noted the necessity of drawing a line between those who may recover loss of society damages and those who may not:

> The line suggested by the Supreme Court in *Moragne* and *Gaudet*, and by our own court in *Sistrunk*, the line between dependents and non-dependents, "appears to be the most rational, efficient and fair" [citing *Truehart v. Blandon*, 672 F.Supp. 929, 938 (E.D. La. 1987)]. It creates a finite, determinable class of beneficiaries. It allows recovery for those with whom the creation of the wrongful death action was concerned: a seaman's dependents.

Miles, 882 F.2d at 988-89.

CONCLUSION

Respondents respectfully submit that the decision of the court below should be affirmed for one or more of the following reasons:

1. With respect to petitioner's claim that the estate is entitled to recover the decedents' anticipated future economic loss, respondents seek an affirmance of the decision of the court below on the basis that there is no general maritime law survival action; therefore, the estate of the decedent is not entitled to recover the anticipated future economic loss of the decedent.

In the alternative, should this Court determine there is a general maritime law survival action, respondents seek an affirmance of the court below on the basis that a general maritime law survival action is preempted by the Jones Act survival provision; therefore, the estate of the decedent is not entitled to recover the anticipated future economic loss of the decedent.

In the alternative, should this Court determine that a general maritime law survival action may supplement the Jones Act survival action, then respondents seek an affirmance of the decision of the court below on the basis that, under such general maritime law survival action, the estate of the decedent is not entitled to recover the anticipated future economic loss of the decedent.

2. With respect to petitioner's claim that nondependents may recover loss of society damages, respondents seek an affirmance of the decision of the court below on the basis that the general maritime law wrongful death action cannot supplement the wrongful death provisions of the Jones Act; therefore, petitioner may not recover loss of society damages.

In the alternative, should this Court determine that a general maritime law wrongful death action may supplement Jones Act remedies, then respondents seek an affirmance of the decision of the court below on the basis that the damages recoverable under such an action must be

consistent with the damages recoverable under the Jones Act wrongful death provision.

In the alternative, should this Court determine that a general maritime law wrongful death action may supplement the Jones Act wrongful death provision, and that recoverable damages under such action include loss of society damages, then respondents seek an affirmance of the decision of the court below on the basis that petitioner may not recover loss of society damages as she was not dependent on the deceased.

Respectfully submitted:

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APPENDIX

46 U.S.C. §762

DEATH ON HIGH SEAS BY WRONGFUL ACT

§762 Amount and Apportionment of Recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

No. 89-1158

In The

Supreme Court of the United States

October Term, 1989

MERCEDEL W. MILES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE SUCCESSION OF LUDWICK ADAM TORREGANO,

Petitioner,

versus

APEX MARINE CORPORATION, WESTCHESTER MARINE SHIPPING COMPANY, INC., ARCHON MARINE COMPANY AND AERON MARINE COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF ON BEHALF OF PETITIONER

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I.

THE JONES ACT DOES NOT FORECLOSE SEAMEN'S REMEDIES UNDER THE GENERAL MARITIME LAW

The primary assertion made by respondents and one that runs as a common thread throughout its brief is that Congress by passage of the Jones Act, 46 U.S.C. §688, had "preempted the field" with respect to seamen's remedies and allegedly "preserved the then existing law." (Respondent brief 2 and 8). As a result any subsequent general maritime developments, including *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970), and *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), are in respondent's conception inapplicable to seamen. Thus there is no wrongful death, survival action or any damages arising out of the death of a seaman in the general maritime law.

Respondent's position is clearly incorrect. The Jones Act in fact was passed in order to expand seamen's remedies and not to freeze or limit them as they then existed. Nor did it foreclose seamen from subsequently developed general maritime remedies. Respondents would have this Court revert back to obsolete law, and ignore almost a century of enlightened development and expansion of remedies.

Searching for authority for their position the shipowner is forced to rely upon language in cases prior to the overruling of *The HARRISBURG*, 119 U.S. 199 (1886). See *Lindgren v. United States*, 281 U.S. 38 (1930), and *Gillespie v. United States Steel Corporation*, 379 U.S. 148 (1964). The issue raised by those cases was clearly addressed in footnote 12 of *Moragne*, 398 U.S., at 396. Referring to *Gillespie*, the Court noted the holding "was only that the Jones Act, which was 'intended to bring

about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, . . . necessarily supersedes the application of the death statutes of the several states.' Id., at 155. The ruling thus does not disturb the seaman's rights under general maritime law, existing alongside his Jones Act claim, to sue his employer for injuries caused by unseaworthiness, (citation omitted) . . . " The Court also believed that the wrongful death remedy being recognized appeared "to be beyond the preclusive effect of the Jones Act as interpreted in *Gillespie*. The existence of a maritime remedy for deaths of seamen in territorial waters will further, rather than hinder, 'uniformity in the exercise of admiralty jurisdiction.' " *Moragne*, 398 U.S., at 396.

Footnote 12 in *Moragne* also points out the fallacy involved in the reasoning of *Lindgren* and *Gillespie*. There was "no question of preclusion of a federal remedy [that] was before the court in *Gillespie* or its predecessor, *Lindgren v. United States*, 281 U.S. 38 (1930), since no such remedy was thought to exist at the time those cases were decided." *Moragne*, 398 U.S., at 396.

In other words, there was no significance to the term "at his election" when referring to a cause of action for death since there was no need for Congress to give an election to pursue a claim under the general maritime law that didn't even exist. The evolution of the case law established that the "at his election" clause in the Jones Act referred to the election of whether to pursue the claim on the law or admiralty side of the court. *McAffoos v. Canadian Pacific S.S. Ltd.*, 243 F.2d 270 (2nd Cir. 1957), cert. denied, 355 U.S. 823 and *McCarthy v. American Eastern Corp.*, 175 F.2d 724, 725 (3rd Cir. 1949) cert. denied, 338 U.S. 868 (1949). See also G. Gilmore & C. Black, *The Law of Admiralty*, §6-23 at 342-343 and §6-25 at 346-348 (2d Ed. 1975).

Commentators have viewed *Moragne* as having "in effect overruled the *Lindgren* and *Gillespie* cases." Gilmore & Black, supra, §6-32 at 367-368. See also the "impressive dissent", Gilmore and Black, supra, at 363, of Justice Goldberg in *Gillespie*, 379 U.S., at 158.

In *The Arizona v. Anelich*, 298 U.S. 110 (1936), this Court made it clear that the Jones Act "was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it. (Citation omitted). Its provisions . . . are to be liberally construed to attain that end (citations omitted) and are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part." Id., at 123. See also *Garrett v. Moore-McCormack*, 317 U.S. 239, 248 (1942) and *Warner v. Goltra*, 293 U.S. 155, 158-159 (1934).

Respondents' reliance upon *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978), and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), is misplaced. The assertion that *Higginbotham's* holding restricted general maritime damages was addressed in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980). There the shipowner argued exactly what respondents argue here that "the reach of *Gaudet's* principal must be limited by the fact that no right to recover for loss of society due to maritime injury has been recognized by Congress under §2 of the Death on the High Seas Act (DOHSA), 46 U.S.C. §762; [Citing *Higginbotham*, supra] or the Jones Act, 46 U.S.C. §688." This Court responded: "Plainly, neither statute embodies an 'established and inflexible' rule here foreclosing recognition of a claim for loss of society by judicially crafted general maritime law." *Alvez*, 446 U.S., at 281-282. Likewise, another party in *Alvez* argued that the Longshoremen's and Harbor Workers' Compensation Act barred recovery of loss of society damages. The Court

noted that "this contention was [not] raised below; in any event it has no merit." Id., at 283 n. 10. This Honorable Court has therefore already addressed "the question of statutory preemption" and rejected it. Id., at 283.

The Court in *Alvez* further stated that *Higginbotham* "never intimated that the preclusive effect of DOHSA extends beyond the statute's ambit. To the contrary, while treating the statutory remedies for wrongful death on the high seas as exclusive, *Higginbotham* expressly reaffirmed that *Gaudet* governs recoveries for wrongful death on territorial waters." Nor did the Court "read the Jones Act as sweeping aside general maritime law remedies." *Alvez*, 446 U.S., at 282. The Court emphasized the point by referring to the lack of "preclusive effect" of the Jones Act "even with respect to true seamen." Id., at 283.

The Court's reasoning in *Alvez* is based upon *Moragne*. There the Court indicated that the remedy applied to seamen when it addressed the "strangest anomaly" – that true seamen were not provided a remedy for death caused by unseaworthiness within territorial waters. *Moragne*, 398 U.S., at 395-396. *Moragne* certainly did not recognize the action exclusively "for other than Jones Act" seamen. (Respondent brief 11).

If the Jones Act preempts general maritime survival actions, wrongful death actions and *Gaudet* damages it would in cases of death eliminate causes of action based upon unseaworthiness; since under the Jones Act the only claim allowed is founded upon negligence. Where unseaworthiness is the sole basis of recovery in the case of death, a seaman's beneficiaries would have absolutely no recovery! There would be no claim for pre-death pain and suffering, lost wages, or medical expenses incurred prior to death. Seamen's beneficiaries would have no claim for loss of support, care, nurture, guidance, education and training, services, or society. The deadly hand of

The HARRISBURG would be felt again. Such a result simply has no support in logic, in the jurisprudence, or in simple fair play.

It is respectfully submitted that Congress in passing the Jones Act did not preempt the field of maritime death remedies.

II.

THERE IS A SURVIVAL ACTION FOR LOSS OF A SEAMAN'S FUTURE EARNINGS

A.

THE GENERAL MARITIME LAW DOES RECOGNIZE A SURVIVAL ACTION

Prior to this Honorable Court's holding in *Moragne*, the Court in *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932) and in *Gillespie v. United States Steel Corporation*, 379 U.S. 148 (1964), held that any cause of action for death perished with the decedent. Both *Cortes* and *Gillespie* lead back to *The HARRISBURG* through *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921) and *Lindgren v. United States*, 281 U.S. 38 (1930). The specific question of survival damages as opposed to a wrongful death was not before the Court in any of the cases.

Though the Supreme Court has not directly addressed a survival action, it is clear that the lower admiralty courts recognize the remedy. See cases cited in Petitioner's Original Brief, p. 14, *Graham v. Milky Way Barge, Inc.*, 811 F.2d 881, 891 (5th Cir. 1987), and *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137, 140 (5th Cir. 1972), cert. denied, 409 U.S. 948 (1972). Consistently, most states provide for a survival cause of action for pre-death losses. S. Speiser, *Recovery for Wrongful Death*, 2d Ed. (1975), Vol. I, §123 at p. 56. Also see *Barbe v. Drummond*, 507 F.2d 794 at 800 n. 6, for the statement: "We believe the dictum in *Cortes* [supra], that the maritime law does not

provide for survival of personal rights of action in tort is no longer good law after *Moragne*."

Respondent's assertion that survival damages are a "windfall" is inappropriate. The relatives of seaman hardly view recovery of a decedent's pre-death pain and suffering, medical expenses or economic contribution as a windfall. In *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), the Court saw an award of survival damages more in terms of preventing "the anomaly of rewarding a [defendant] for killing his victim rather than injuring him." *Evich*, 819 F.2d at 258. In other words, avoiding a "windfall" to the party responsible for the death of a seaman.

The shipowner in brief also questions the status afforded seamen as "wards of the court" as being over used and short sighted. For there to be a maritime industry in the United States, there must be seamen to employ. Their lack of protection and recovery should not be a basis for economic gain. Moreover, there is just as much need today for broad protection of seamen as there was in the past. A seaman is subject to the hazards of sea on a self contained vessel, having numerous mechanical hazards, and under the complete command of the Master. See Martin J. Norris, *The Law of Seamen* (4th Ed. 1985) §271, at 190. Moreover, the shipowners expressed concern for the economic health of seamen as a group is somewhat misleading since in this case it seeks indemnity from the perpetrator's union. *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989) at 989-993.

The only statutorily recognized survival action in the general maritime law is under the Jones Act through FELA, 45 U.S.C. §59. If the shipowner's position is correct then there would be no survival damages for persons killed on the high seas, *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 at 576, n. 2 (1974), and for non-seamen who meet their deaths in territorial waters, unless a state

remedy was available. The damages excluded would be significant. These would include pre-death lost wages, pain, suffering, as well as medical expenses incurred prior to death. Such damages are hardly "windfalls" to a decedent's beneficiaries.

B.

THE JONES ACT DID NOT PREEMPT THE GENERAL MARITIME LAW SURVIVAL ACTION IN THE CASE OF THE DEATH OF A SEAMAN

Congress in passing the Jones Act did not preempt a seaman's general maritime law death claims, including a survival action. (See Argument §I, supra). The shipowner points to the phrase "at his election" found in the Jones Act, 46 U.S.C. §688(a). Relying upon *Lindgren v. United States*, 281 U.S. 38 (1930), the shipowner contends that this Court concluded that Congress made "an intentional omission" and that Congress intended to exclude a cause of action for death in the general maritime law. It is respectfully submitted this is not the law. To so hold would mean Congress intentionally omitted something that didn't even exist – a general maritime death action. In fact, in *Lindgren* the Court recognized that the omission, "at his election" occurred "since there was no right to indemnity under the prior maritime law which [the personal representative] might have elected to pursue." *Lindgren*, 281 U.S., at 48.

More importantly, *Moragne* overruled *Lindgren* when it sought to rectify three "anomalies." The third of those, "assertedly the 'strangest' . . . is that a true seaman – that is, a member of a ship's company, covered by the Jones Act – is provided no remedy for death caused by unseaworthiness within territorial water, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work traditionally

done by seamen, does have such a remedy when allowed by a state statute." *Moragne*, 398 U.S., at 395-396.

Gilmore & Black, supra, at 368 point out that the third anomaly mentioned in *Moragne* resulted from *Lindgren* and *Gillespie*, and that the Court was seeking to "do away with" that anomaly. "The remedy provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness although in the latter case the decedent must have been a person (e.g., a Jones Act seaman) entitled to the warranty of seaworthiness." Gilmore & Black, supra, at 368.

C.

GENERAL MARITIME LAW SURVIVAL ACTION DAMAGES ARE NOT LIMITED TO THOSE DAMAGES PRESENTLY ALLOWED UNDER THE JONES ACT

The respondents seek to defeat the economic losses of the estate of a deceased seaman, *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), by contending the preemption of the Jones Act. (See Argument, §I, supra).

This Court's admiralty jurisdiction was established in the Constitution, U.S. Const. art. 3, §2, and allows for the continued development of the law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) at 360-361.

Courts have traditionally provided recourse and remedies in the area of admiralty law. In fact, at the respondent's insistence in the present case the Fifth Circuit recognized the claim of a shipowner over and again a maritime union despite Congressional acts regulating union/employer relationships. *Miles*, 882 F.2d, at 989-993. Likewise, the Ninth Circuit in *Evich v. Morris*, 819 F.2d 256, recognized the court's inherent power in admiralty. In order to avoid an injustice it chose to allow damages

for an estate's economic loss, when there is no one actually dependent upon the decedent.

The allowance of economic damages to the estate in the circumstances set out in *Evich*, "better becomes the humane and liberal character of proceedings in admiralty", *Moragne*, 398 U.S., at 387.

D.

THE JURISPRUDENCE AND STATUTORY LAW DOES NOT FORECLOSE AN AWARD OF AN ESTATE'S ECONOMIC LOSSES UNDER A GENERAL MARITIME LAW SURVIVAL ACTION

Respondents assert that an "estate" is a competing class of beneficiary and that uniformity would be served by denying the beneficiaries of an estate the economic losses of the decedent. This is not correct as a result of the *Evich* Court limiting recovery of economic damages to instances where a seaman's beneficiaries could not claim loss of support. Economic damages are recoverable under the Jones Act, a wrongful death statute. Allowing damages to an estate, under a general maritime survival action, when not available under the Jones Act, would provide for consistent recovery; something not dependent upon who survives a decedent.

The shipowner's reliance upon the Jones Act is misplaced The Act through FELA speaks in terms of "an action for damages at law." Its plain meaning does not limit the damages allowed to "the pecuniary loss sustained", as stated in DOHSA, 46 U.S.C. 762. (See Argument, §III A (1), infra).

The shipowner is in error in asserting that an estate's economic loss is for a decedent's "lost wages." As pointed out by *Speiser*, supra, §3:2, at 122-126, there are various methods of determining an estate's loss in this area. The most common would provide for an offset for

the economic consumption of the decedent. This would substantially reduce the amount of damages that could be awarded in a survival action. Moreover, such awards are allowed in a number of states in situations where there is no beneficiary to receive the decedent's support. See *Speiser*, supra, §3:1, at 104-107, n. 4.

The shipowner attacks the opinion of the court in *Evich v. Morris*, 819 F.2d 256, by referring to its basic reasoning as "one unconvincing paragraph which sounds more like an apology than a persuasive argument." (Respondent brief 20). The Ninth Circuit need apologize to no one. It had before it a case involving the regrettable death of an apparently young individual upon the sinking of a vessel due to the clear negligence of its captain. *Berg v. Chevron U.S.A., Inc.*, 759 F.2d 1425 (9th Cir. 1985), and *Evich v. Connelly*, 759 F.2d 1432 (9th Cir. 1985). The Ninth Circuit recognized an appropriate remedy given admiralty law's humane and liberal outlook.

Though the shipowner wraps itself in a cloak of indignation in response to any assertion that it would seek to benefit from the death of a seaman, the reality without *Evich* is that there is an economic incentive to place in the most hazardous positions those persons upon whom no one relies for support. Unfortunately, these are usually the young and inexperienced. One could conjure up the image of marginal operators shipping out summer employed college students on clearly unseaworthy vessels. Placing liability upon responsible parties is not imposing punitive damages as the shipowner asserts, but instead encourages responsible and safe conduct.

Uniformity of remedies is not altered by the allowance of these damages. As the law now stands an estate has a claim for a seaman's pre-death pain and suffering, medical expenses, and lost wages. To extend recovery to the balance of the decedent's post death

economic loss, otherwise not subject to recovery, does not alter what is presently allowed. In fact, it is more consistent with those situations where a seaman dies with persons relying upon his support. Under a wrongful death action those persons are entitled to seek future loss of support. When a seaman dies without such claimants, allowing an estate's future economic loss (offset by consumption) provides for the same recovery. Damages are not based upon the happenstance of persons being supported by the decedent.

III.

LOSS OF SOCIETY DAMAGES

A.

THE JONES ACT DID NOT PREEMPT THE GENERAL MARITIME LAW REMEDIES PROVIDED TO SEAMEN

1) The Beneficiaries of Jones Act Seamen Are Not Limited to Recovery of Pecuniary Losses in Wrongful Death Cases.

In the trial court and in the Court of Appeal the shipowner on this issue consistently maintained that dependency must be established before the parents of a deceased seaman could claim loss of society damages. Now in an effort to defeat the parents' claim for these damages the shipowner for the first time contends that loss of society damages as recognized in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), do not apply to seamen. The effect of this position would be to foreclose not only non-dependent parents, but *all* Jones Act beneficiaries, dependent or not, from a claim for such damages.

In essence, the shipowner is asserting that the development of the general maritime law in providing non-pecuniary damages was not intended to benefit those

primarily protected thereunder, namely, seamen. Instead, Congress by passing the Jones Act, which expanded seamen's remedies, in turn foreclosed seamen from the subsequent development of actions and remedies recognized under the general maritime law. Petitioner hereinabove addressed this issue. (See §I, supra).

A plain reading of the Jones Act and FELA establishes that beneficiaries thereunder are entitled to "damages." It is only through this Court's interpretation that damages under the Jones Act have been limited to pecuniary losses. *Michigan Central Railroad v. Vreeland*, 227 U.S. 59 (1913). At that point the common law was such that non-pecuniary damages were not normally allowed. The case law that informed this Honorable Court in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) at 587, allowing loss of society damages is certainly applicable to FELA. It is respectfully submitted that there is no basis for the continued restrictive interpretation of the Jones Act and FELA, given the plain wording set forth therein and this Court's view that FELA is a broad, remedial statute that is to be liberally construed. *Urie v. Thompson*, 337 U.S. 163, 180 (1949). Most states allow these damages. Likewise, injured seaman and railway workers should be entitled to this recovery. See also D. Normann, *Holy Writ or Wholly Wrong?*, 33 Loyola L. Rev. 973 (1988).

In *Gaudet* the Court was concerned with what damages were applicable to a wrongful death claim under the general maritime law as provided in *Moragne*. The language of that decision does not restrict it's application to longshoremen. In fact, *Alvez*, 446 U.S., at 283, citing *Moragne*, 398 U.S., at 396, recognized that the Court had "held" that there is a wrongful death cause of action in the general maritime law for seamen killed in territorial waters and that the Jones Act lacked "such preclusive effect even with respect to true seamen" that it would not

foreclose the wife of a longshoreman from non-pecuniary damages.

The shipowner's position would overrule *Moragne* and *Gaudet*, as applied to seamen and reinstate the third anomaly referred to in *Moragne*, 398 U.S., at 395. This would resurrect and salvage *The HARRISBURG*. A remedy provided specifically to protect seamen, unseaworthiness, would be denied them in cases of death, but provided to all other maritime workers. The only persons to whom a shipowner would owe a seaworthy vessel in a case of death is to non-employee "*Sieracki* seamen" on board the vessel. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). The result sought by the shipowner would be devastating to the rights of seamen.

2 and 3) Congress Did Not Preempt a Seaman's Beneficiaries' General Maritime Law Wrongful Death Action and the Non-Pecuniary Damages Allowed Thereunder.

This Honorable Court clearly sanctioned the application of *Moragne* and it's progeny, *Gaudet*, to seamen death claims when the Court dispensed with the "third anomaly." 398 U.S., at 395. Thus, there was never a need for this Honorable Court to determine that the remedy and damages set forth in those cases included seamen since it was generally understood that they did. *Alvez*, 446 U.S., at 283. See also *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), *Hlodan v. Ohio Barge Lines, Inc.*, 611 F.2d 71 (5th Cir. 1980) and *Cruz v. Hendy International Co.*, 638 F.2d 719, 724-725 (5th Cir. 1981).

The shipowner attempts to exclude seamen from the action and damages in *Moragne* and *Gaudet* by contending that this Court must adhere to a consistency within the class of seamen. The argument is simply a more subtle method by which to contend that the Jones Act preempts the general maritime law. Holding that only the damages allowed under the Jones Act are available under the

general maritime law is to overrule *Gaudet* as it applies to seamen. Dependency would no longer be an issue. Uniformity is certainly a goal in admiralty, but it relates primarily to the law being uniformly applied throughout the United States. It is not a requirement of consistency, something impossible to achieve given the historical development of the Jones Act and the general maritime law. Nor can it be obtained given the different remedies recognized under the Jones Act, the Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq., and DOHSA.

B.

DEPENDENCY IS NOT A REQUIREMENT FOR LOSS OF SOCIETY DAMAGES UNDER THE GENERAL MARITIME LAW

The Appellate Court in *Miles* and the shipowner in brief contends that this Honorable Court by usage of the term "dependents" in *Moragne* and *Gaudet* has limited recovery of loss of society damages to a deceased seaman's dependents. Petitioner respectfully submits that such an analysis places greater emphasis on the usage of a term than on the meaning of a holding.

This Honorable Court stated long ago, through Justice Marshall, in *Cohen v. Virginia*, 19 U.S. (6th Wheat.) 264, 399-400, (1821), that general expressions in one case do not control the holding in another case where the very point at issue is under review:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgement in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

This Court did not settle the issue of beneficiaries in *Gaudet* through the use of the term "dependents." The dissent in *Gaudet* recognized this when it stated that the Court had "not resolved many of the practical questions left open in *Moragne*, such as how to define the class of beneficiaries . . . " *Gaudet*, 414 U.S., at 602.

It is respectfully submitted that non-dependent parents are entitled to this item of damages under the general maritime law.

1) The Interpretation of Maritime Wrongful Death Statutes Do Not Limit Loss of Society Damages to Dependents.

The shipowner submits that since DOHSA expressly limits beneficiaries thereunder to pecuniary damages and the Jones Act likewise through interpretation; then the statutes cannot be a basis upon which non-dependents can recover loss of society damages. This exact argument was addressed and rejected in *Alvez*, 446 U.S., at 281-284. There is no statutory preemption. The shipowner is attempting to judicially legislate the adjective "dependent" from in front of "next of kin" and "relative" to a point in front of all beneficiaries listed in DOHSA and the Jones Act.

As Judge Rubin pointed out when he was on the trial bench in *Hamilton v. Canal Barge Co., Inc.*, 395 F.Supp. 978 (E.D. La. 1975), the term "dependent" modifies only "relatives" in DOHSA and "next of kin" in the Jones Act. "It would therefore seem untoward to read a dependency requirement into the *Moragne* action for wrongful death." Id., at 985.

The shipowner's argument leads one to believe that non-dependents have no claim under the Jones Act or DOHSA. That is simply not so. A beneficiary may be entitled to monetary damages under those statutes, yet not be a dependent. Lack of dependency does not foreclose recovery. "Under neither the Jones Act nor DOHSA, however, is dependency required by a parent to recover. [Citation omitted]. This is the clear intent of both statutes . . . " *Hamilton*, 395 F. Supp. 978, at 985.

It is respectfully submitted that the Court in *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990), is simply in error in referring to DOHSA by stating that the "requirement of dependence is written into the statute, insofar as damages are expressly limited to 'pecuniary loss.' " 894 F.2d at 812 n. 8. *Anderson's* additional statement that "damages under the Jones Act, similarly are limited to the sort of pecuniary losses that only dependents are likely to suffer" is likewise misleading. The *Anderson* court's view that the statutes were written so as to protect only dependents is too broad of an interpretation of the language in those statutes.

Mrs. Miles in the lower court recovered pecuniary damages for loss of support and/or services, while at the same time the jury held specifically that she was not dependent upon her son. (See J.A. 11-12). There is absolutely no requirement on the part of the parents that a court determine dependency before recovery can be had under either DOHSA or the Jones Act. To view those statutes as the shipowner suggests would be to ignore their plain meaning and deny recovery to beneficiaries not dependent upon the decedent. The shipowner's assertion that "there is thus no indication that Congress has intended to make the action available to anyone other than the decedent's dependents" is wrong. (Respondent brief 38). Congress could have placed the modifying

adjective "dependent" before parents or spouse or children but chose not to do so.

2) Loss of Society Damages Under the Maritime Wrongful Death Action Are Not Limited to Dependents of the Decedent.

Moragne did not designate the beneficiaries entitled to recover wrongful death damages. It specifically left to other cases a determination of damages and beneficiaries. *Moragne*, 398 U.S., at 407. In *Gaudet* this Honorable Court addressed damages. In *Miles*, this Court now has the opportunity to address the issue of beneficiaries.

The shipowner repeatedly contends that the beneficiaries under the *Moragne* cause of action cannot be broader than those set forth in DOHSA and the Jones Act. Petitioner is not broadening those beneficiaries, but instead is seeking to apply the plain and clear language of those statutes. Non-dependent parents have a cause of action under both the Jones Act and DOHSA. Likewise, they should have a claim for loss of society damages under *Gaudet*. These are consistent categories. In fact, it is respondent who is arguing for a broader class by asserting the requirements of dependency. As the law now stands in this case persons clearly outside of the beneficiaries listed in DOHSA and the Jones Act would have a claim for loss of society damages. For example, a dependent mother-in-law, step child, aunts or uncles, or for that matter a friend or lover, dependent upon a decedent would have a claim for loss of society damages, irrespective of their listing in DOHSA or the Jones Act.

Should respondents contend that only dependent Jones Act and DOHSA beneficiaries are entitled to such damages, then it is asking this Court to rely on the very language it is asking the Court to ignore. They are asking the Court to move the modifying adjective, "dependent"

such as loss of support, are calculated in part. *Evich*, at 258; W. Keeton, D. Dobbs, R. Keeton and D. Owen, *Prosser and Keeton on Torts*, §126 at 943 n. 9 (5th Ed. 1984).

As noted in *Prosser* at 942-43, the recovery in a survival action "is the same one the decedent would have been entitled to [illegible]eath, and thus includes such items as *wages lost after injury and before death*, medical expenses incurred and pain and suffering." (Emphasis added.) See also, for example, *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984) ("[T]he general maritime law includes a survival action permitting recovery of a decedent's *pre-death* damages." (Emphasis added.)) At footnote 9 on page 943 of *Prosser*, it is noted that a minority of states allow recovery in a survival action for earnings that would have been income to the decedent during his life expectancy but for his death, with a deduction for living or family expenses. Since recovery for future economic loss presents the spectre of double recovery, and is permitted in only a few states, it is difficult to understand why the Ninth Circuit panel permitted the estate to recover future economic loss purportedly pursuant to the general maritime law. Indeed, it is more in keeping with the maritime law's concern with uniformity to follow the majority rule that to the extent

lost wages are recoverable in a survival action, they are recoverable only for the period after injury and before death.

As pointed out by the Fifth Circuit in *Miles* at 986, the maritime wrongful death action which this Court recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) arose in the context of virtual universal recognition of wrongful death actions outside of the maritime law. In contrast, however, few courts have recognized the right of an estate to recover the potential lost earnings of a deceased individual. The uniformity of the maritime law is best served by rejecting petitioner's claim that the "estate" should be entitled to recover the loss of future wages of the decedent in a maritime survival action. In view of the rejection of the *Evich* rationale by courts considering the loss of future earnings issue, and in view of *Evich*'s mainfest departure from well-settled maritime jurisprudence, the full Ninth Circuit is virtually certain to reexamine the issue in the future.

Although there is a split among the circuits brought on by the incongruous decision of the *Evich* panel, respondents respectfully suggest that the issue is not one that will require adjudication by this Court as maritime courts have recognized that the *Evich* panel's

reasoning is flawed and contradictory to established maritime law.

B. Dependency Required for Recovery of Loss of Society Damages

In support of her contention that the non-dependent parents of the deceased adult seaman should be entitled to recover loss of society damages under the general maritime law, petitioner claims the decision of the court below in *Miles v. Melrose*, 882 F.2d 980 (5th Cir. 1989), *reh'g. denied*, 888 F.2d 1388 (5th Cir. 1989) has created a conflict with the Ninth Circuit's decision in *Cook v. Ross Island Sand & Gravel Company*, 626 F.2d 746 (9th Cir. 1980) with respect to this element of damages.

In *Cook*, however, the Ninth Circuit, with little discussion, simply affirmed the jury's award for loss of society in a maritime case on the basis that the general maritime law provided full recovery for such damages under *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) and *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974). The *Cook* court did not discuss the issue before this Court, that is, whether wrongful death beneficiaries who are not dependent on the decedent may recover loss of society damages.

Although the court noted in footnote 1 and accompanying text that the jury had declined to award damages for the decedent's "physical assistance" to his mother in the operation and maintenance of her business, there was no discussion concerning that jury determination and its relationship to financial dependency. The issue of dependency, as such, does not appear to have been raised before the court.

Indeed, in a subsequent district court opinion within the Ninth Circuit specifically addressing the dependency issue, *Glod v. American President Lines, Ltd.*, 547 F.Supp. 183 (N.D. Cal. 1982), the court noted that the issue had not been addressed by this Court, the Ninth Circuit, or any court within the Ninth Circuit. *Glod*, 547 F.Supp. at 185. Addressing the issue, the *Glod* court, noting this Court's emphasis on the right of a decedent's *dependents* to recover loss of society damages, held that the decedent's non-dependent siblings were not entitled to recovery of such damages. *Glod*, at 186.

Petitioner's contention that there is split in the circuits is misleading. Those courts specifically addressing the dependency issue uniformly have concluded that recovery of loss of society damages requires a showing of financial dependency. *Miles v. Melrose,*

supra; Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455, 460-61 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1205 (1986); *Truehart v. Blandon*, 672 F.Supp. 929, 938 (E.D. La. 1987); *Neal v. Barisich*, 707 F.Supp. 862, 872-73 (E.D. La. 1989), *aff'd.*, 889 F.2d 273 (5th Cir. 1989); *Toups v. DuMar Marine Contractors, Inc.*, 644 F.Supp. 475, 478 (E.D. La. 1985)(non-fatal injury); *Glod v. American President Lines, supra*.

This Court first addressed loss of society claims in maritime wrongful death actions in *Sea-Land Services, Inc. v. Gaudet, supra*. *Gaudet* repeatedly referred to the claimants entitled to recover loss of society damages as "dependents." Similarly, in *Moragne v. States Marine Lines, Inc., supra*, this Court, in creating a wrongful death action under the general maritime law, referred to the beneficiaries of the new cause of action as "dependents" of the deceased. Thus, this Court and the lower courts have repeatedly emphasized that the maritime wrongful death action is intended to provide solicitude to the *dependents* of deceased seamen.

There are strong policy reasons why loss of society damages should be available only to dependents of the deceased. As explained by the Fifth Circuit in *Miles*, at 988-89:

> Strict liability, such as that for unseaworthiness, is based in part on the assumption that the defendant is best able to bear and distribute the cost of the risk of injury. But there are limits to a defendant's power to shift losses to the public. The larger and more amorphous the potential class of plaintiffs, the more difficult it is to estimate and insure against the risk in advance, weakening the justification for imposing liability. The number of plaintiffs who could allege a loss of love and affection as a result of the death of a dearly beloved seaman -- aunts and uncles, nieces and nephews, even friends and lovers -- necessitates that we draw a line between those who may recover for loss of society and those who may not. The line suggested by the Supreme Court in *Moragne* and *Gaudet*, and by our own court in *Sistrunk*, the line between dependent and nondependents, "appears to be the most rational, efficient and fair." It creates a finite, determinable class of beneficiaries. It allows recovery for those with whom the creation of the wrongful death action was concerned: a seaman's dependants. (Footnotes omitted.)

Numerous courts both within and without the Fifth Circuit have concluded that loss of society damages in a maritime action are recoverable only by dependents of the deceased. The Ninth Circuit decision in *Cook v. Ross Island Sand & Gravel Co.*, did not discuss the dependency issue and cannot properly be considered in

conflict with the decisions of the other courts. As the decision of the Fifth Circuit is consistent with the precedents of this Court and the decisions of other courts, respondents submit that the lower court's decision, with respect to the loss of society issue, merits no further review.

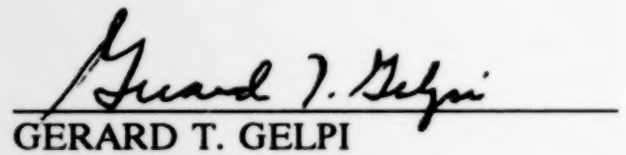
CONCLUSION

The decision of the court below in denying the claim of the decedent's estate for the decedent's future economic loss represents a faithful adherence to the tenets of the maritime law. Although the Ninth Circuit has decided the issue in a manner contrary to that of the Fifth Circuit, the Ninth Circuit's decision has been recognized as a manifest deviation from established maritime law. As the decisions of the Fifth Circuit and other courts in denying this item of damages is well grounded in and follows logically from maritime jurisprudence, the issue does not warrant review by this Court.

Similarly, petitioner's claim that the non-dependent parents of the deceased are entitled to recover loss of society damages does not present an issue in which there is a genuine conflict among the circuits. The single case cited by petitioner in support of her claim that a conflict exists does not directly address the

dependency issue. The decisions of those courts which specifically address the issue have concluded, as did the court below, that the general maritime law's solicitude for *dependents* of the deceased does not warrant recovery of loss of society damages by non-dependents. Accordingly, respondents respectfully suggest that the decision of the court below merits no further review.

Respectfully submitted,



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No. 89-1158

In The

Supreme Court of the United States

October Term, 1989

MERCEDEL W. MILES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE SUCCESSION OF LUDWICK ADAM TORREGANO

Petitioner,

versus

APEAX MARINE CORPORATION, WESTCHESTER MARINE SHIPPING COMPANY, INC., ARCHON MARINE COMPANY AND AERON MARINE COMPANY

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed January 8, 1990
Certiorari Granted February 26, 1990

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APPENDIX

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Relevant Docket Enteries

85-4728

B 3
JURY

SEAMAN CASE

PLAINTIFFS	DEFENDANTS
MERCEDEL W. MILES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE SUCCESSION OF LUDWICK ADAMA TORREGANO	CLIFFORD A. MELROSE APEX MARINE CORPORATION WESTCHESTER MARINE SHIPPING COMPANY, INC. ABC INSURANCE COMPANY

3rd Party Complt – 10/9/86 Apex Marine Corporation Westchester Marine

Seafarers International Union of North America (OUT 12-18-86)

1st Suppl and Amending Complt – 11-5-86

London Steamship Owners Mutual Insurance Association (OUT 3-29-88)

Seafarers International Union of North America (OUT 1-20-87)

Amended 3rd Pty Complt – 12-18-86 Apex Marine Corp. & Westchester Marine

Seafarers International Union, Atlantic, Gulf Lakes, and Inland Waters District, A.F.L. – C.I.O. (OUT 9-8-87)

2nd Suppl and Amended Complt – 1-20-87

Aeron Marine Company, Seafarers International Union, Atlantic, Gulf Lakes and Inland Waters District, A.F.L. – C.I.O. (OUT 9-8-87)

3rd Suppl & Amending Complt – 11/17/87
No new ptys added

CAUSE

46 USC 688 – MARINE, PERSONAL INJURY, SEAMAN, JONES ACT (Death Resulting From Multiple Stab Wounds)

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DATE	NR.	PROCEEDINGS
10-15-85	1	Complt; Issd 3 L.A.
11-18-85	2	*ANSWER* of Apex MArine Corp and Westchester Marine Shipping Co, Inc to pltf's complt.
10-9-86	8	3rd pty complt by Apex Marine Corp & Westchester Marine Shipping agst Seafarers International Union of North America; issd (l) summs.
11-5-86	11	Pltf's lst suppl and amending petn – adding London Steamship Owners Mutual Ins and Seafarers International Union of North America as defts. Issd (2) sms.
12-18-86	16	Amended 3rd pty complt by Apex Marine Corp and Westchester Marine Shipping Co subst Seafarers International Union of North America or S.I.U. for Seafarers International Union, Atlantic, Gulf, Lakes, and Inland Waters District, A.F.L.-C.I.O.
1-20-87	20	Pltf's 2nd suppl and amended petn-adding Aeron Marine Co and to subst for Seafarers International Union of N. A. the proper union, Seafarers Internat'l Union Atlantic, Gulf, Lakes and Inland Waters District, A.F.L.-C.I.O. Issd (2) sms.
1-28-87	21	Mtn by Seafarers Internat'l Union to dism all claims agst it by the 3rd pty pltfs Apex Marine Corp and Westchester Marine.
2/12/87	23	*Answer* of Apex Marine, Wechester Marine & Aeron Marine Co to second suppl & amend complt of pltf.
2-19-87	25	Mtn by Seafares International Union, Atlantic, Gulf, Lakes and Inland Waters District to dism Pltf's complt.

9/8/87	50	ORDER & REASONS; ORDERED that mtn of Seafarers International Union, Atlantic, Gulf, Lakes & Inland Waters District AFL-CIO for order dismissing claims of Apex Marine COrp & Westchester Marine SHipping CO be GRANTED; Mtn for order dismissing claims of Mercedel Miles, individually & as administratix of the succession of Ludwick Adam Torregano be GRANTED
11/17/87	58	Pltf's 3rd suppl & amending petition. No new ptys added.
12/21/87	68	*ANSWER* of Apex Marine Corp, Westchester Marine Shipping Co., Inc., Aeron Marine Company & Archon Marine Company to pltf's 3rd supplemental & Amending complt.
1/13/88	72	Mtn by Apex Marine Corp, Westchester Marine Shipping Co., Inc., Aeron Marine Co & Archon Marine Corp.to strike.
1/15/88	84	Pltf's memo in opp to mtn to strike loss of society claim.
1/26/88	92	M.E. 1/19/88: JURY TRIAL: JURY PICKED, SWORN & INSTRUCTED: JURY EXCUSED & CONT to 1/20/88 at 10:00 A.M. (FJRH) dktd 1/27/88.
1/26/88	93	M.E. 1/20/88: JURY TRIAL . . . Matter CONT to 1/21/88 at 10:00 A.M. (FJRH) dktd 1/27/88.
1/26/88	94	M.E. 1/21/88: JURY TRIAL: Witnesses for pltf cont; . . . pltf rests; witnesses for defense; . . . defense rests; Jury excused & matter CONT to 1/22/88 at 10:30 A.M. (FJRH) dktd 1/27/88.
1/26/88	95	M.E. 1/22/88: JURY TRIAL: Closing argment; Ct Charge to jury; Jury retires to

delebrate; . . . jury retns for instruction of Ct; Jury is excused. (FJRH) dktd 1/27/88.

1/26/88	96	M.E. 1/23/88: JURY TRIAL: Jury retires for further delebration; Jury returns with verdict; Ct orders verdict received & recorded; Jury excused subject to call. (FJRH) dktd 1/27/88.
2/29/88	99	JUDGMENT: in favor of pltf & agst Apex Marine Corp, Westchester Marine Shipping Co., Archon Marine Co. under Jones Act, finding defts negligent in the death of Ludwick A. Torregano; Further ORDERED that judgment in favor of Aeron Marine Co., & agst pltf, finding the vessel M/V Archon was not unseaworthy at time of incident; Further ORDERED that judgment in favor of pltf & agst Apex Marine Corp., Westchester Marine Shipping Co., & Archon Marine Co. in amt of $140,000.00 for pain & suffering of Ludwick A. Torregano prior to his death, to be reduced by 7% or $9,800.00, the amt of contributory negligence found on part of the deceased, Ludwick A. Torregano, together with legal interest from date of judgment until paid & all costs of these proceedings; Further ORDERED that judgment in favor of pltf & agst Apex Marine Corp, Westchester Marine Shipping Co. & Archon Marine Co. in amt of $7,800.00 loss of support & service of decedent Ludwick A. Torregano be reduced by 7% or $546.00, the amt of contributory negligence found on part of deceased, Ludwick A. Torregano, together with legal interest thereon from date of judgment until paid & all costs of these proceedings. Further ORDERED that judgment in favor of Apex Marine Corp,

Westchester Marine Shipping Co. & Archon Marine Co. & agst pltf individually as Administratrix of the Succession of Ludwick Adam Torregano, denying any claim for loss of society; Further ORDERED that judgment in favor of Apex Marine Corp., Westchester Marine Shipping Co. & Archon Marine Co. & agst pltf appearing on behalf of decedent's father, Joseph Torregano, denying Joseph Torregano any claim for loss of services; . . . (FJRH) dktd 2/29/88.

3/14/88	100	Mtn of Apex Marine Corp., Westchester Marine Shipping Co., Inc., Aeron Marine Co. & Archon Marine Co. for judg n/w/s/ the verdict; hrg set 5/4/88 at 10:00 am bfr Judge.
3/14/88	101	Pltf's mtn for judg n/w/s the verdict, alternatively to amend judg, or alternatively for new trial; hrg set 5/4/88 at 10:00 a.m..
5/6/88	105	M.E. 5/4/88 – Hrg on pltf's mtn for judg NOV, alt to amend judg or alt for new trial & mtn of Apex Marine Corp., Westchester Marine Shipping Co., Aeron Marine Corp., & Archon Marine Co. for judg NOV – mtns DENIED. (FJRH) dktd 5/6/88.
5/11/88	106	Pltf's *Ntc of appeal* from the judg entered 2/29/88 & from orders & rulings adverse to petitioner entered by Ct during trial of 1/19/88 thru 1/23/88.
5/25/88	107	Ntc of Cross-Appeal by Apex Marine Corp, Westchester Marine Shipping Co., Inc. & Archon Marine Company from Order denying Mtn by defts' for judg of 5/6/88 & from final judg of 2/29/88.
6-29-88	XX	Record forwarded to Ct of Appeals.

10-15-88
CROSS APPEAL NO. X88-3468
CASE NUMBER 88-3325

Circuit 5 Appeal S from Eastern District of Louisiana at New Orleans APC 07-07-88

Date docketed 5-13-88 $65 Fee Paid in D.C. (Both) Judge Frederick J. R. Heebe

Date Notice of Appeal Filed 05-11-88 APC 5-25-88

D.C. Docket Number CA-85-4728-B (3) Reporter Marilyn Young

MERCEDEL W. MILES, Individually
and as Administratrix of the
Succession of LUDWICK ADAM TORREGANO,

Plaintiff-Appellant
Cross-Appellee,

versus

CLIFFORD A. MELROSE, ET AL.,

Defendants,

APEX MARINE CORPORATION,
WESTCHESTER
MARINE SHIPPING COMPANY, INC. and
ARCHON MARINE COMPANY,

Defendants-Third Party
Plaintiffs-Appellees-
Cross-Appellants,

and
AERON MARINE COMPANY,

Defendant-Appellee,

versus

SEAFARERS INTERNATIONAL UNION,
ATLANTIC, GULF, LAKES, AND
INLAND WATERS DISTRICT, AFL-CIO,

Defendant-Third Party Defendant-Appellee.

JUL 7 1988	Record on Appeal
3-9-89	Case Argued
09/11/89	Opinion Rendered
SEP 25 1989	Petition for Rehearing (J) ✔ Appellant ___ Reg.
SEP 25 1989	Petition for Rehearing (J) ✔ Appellant ✔ En Banc
10-11-89	Order Denying Rehearing
2-5-90	Notice of Flg. of Cert. Pet. on 1-8-90
2-28-90	Order of S.C. ___ Denied ✔ Granted 2-26-90

MINUTE ENTRY:
HEEBE, J.
JANUARY 21, 1988

MOTIONS:

[TITLE OMITTED IN PRINTING]

AT THE CLOSE OF PLAINTIFF'S CASE:

MOTION OF DEFENSE TO STRIKE CLAIM OF JOSEPH OSCAR TERREGANO FOR LOSS OF SOCIETY, ARGUMENT, MOTION GRANTED

MOTION OF DEFENSE FOR DRIECTED VERDICT TO STRIKE CLAIM OF MERCEDEL MILES FOR LOSS OF SOCIETY, ARGUMENT, DENIED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MERCEDEL W. MILES, Individually and as Administratrix of the Succession of LUDWICK ADAM TORREGANO

versus

CLIFFORD A. MELROSE, APEX MARINE CORP., WESTCHESTER MARINE SHIPPING CO., INC., AND ABC INSURANCE CO.

CIVIL ACTION
NO. 85-4728
SECTION "B"

INTERROGATORIES

1. Were any of the defendants, Apex Marine Corporation, Westchester Marine Shipping Co., and Archon Marine Co., negligent?

Yes ✔ No ___

If your answer to Question No. 1 is "Yes," then proceed to Question No. 2. If your answer to Question No. 1 is "No," then skip Question No. 2 and proceed to Question No. 3.

2. Did the negligence of either Apex Marine Corporation, Westchester Marine Shipping Co. and Archon Marine Co. play a part, even the slightest, in causing Ludwick Torregano's death?

Yes ✔ No ___

Proceed to Question No. 3.

3. Was the M/V ARCHON unseaworthy?

Yes ___ No ✔

If your answer to Question No. 3 is "Yes," then proceed to Question No. 4. If your answer to Question No. 3 is "No," skip Question No. 4 and proceed to "Directions for Answering the Remaining Questions".

4. Was the unseaworthiness of the MV ARCHON a proximate cause of Ludwick Torregano's death?

Yes _____ No. ✔

Proceed to "Directions for Answering the Remaining Questions".

DIRECTIONS FOR ANSWERING THE REMAINING QUESTIONS

If you answered either or both Questions No. 2 and 4 "Yes," then go on to Question No. 5. If you answered both Questions No. 2 and 4 "No," or if you left both unanswered, then skip the remainder of the questions as your deliberations are finished.

5. Was the deceased Ludwick Torregano, contributorily neligent?

Yes ✔ No. _____

If your answer is "Yes," proceed to Question No. 6. If your answer is "No," skip Question No. 6 and 7 and proceed to Question No. 8.

6. Was Ludwick Torregano's negligence a proximate cause of his death?

Yes ✔ No _____

If your answer is "Yes," proceed to Question No. 7. If your answer is "No," skip Question No. 7 and proceed to Question No. 8.

7. To what extent, expressed in percentage, did Ludwick Torregano's negligence contribute to his death?

07%

Proceed to Question No. 8.

8. If your answer to Question No. 2 *or* Question No. 4 is "Yes," what amount in dollars do you find would fairly and adequately compensate the Estate of Ludwick Torregano for Ludwick Torregano's pain and suffering, if any, prior to his death? In reaching this figure you are *not* to deduct any percentage or sum representing Ludwick Torregano's contributory negligence, as the Judge will make that reduction, if required.

$140,000

Proceed to Question No. 9.

9. If your answer to Question No. 2 or Question No. 4 is "Yes," is the plaintiff, Mercedel Miles, entitled to recover damages for her loss of support and services from the decedent?

Yes ✔ No _____

If your answer is "Yes," proceed to Question No. 10. If your answer is "No," skip Question No. 10 and proceed to Question No. 11.

10. What amount in dollars do you find would fairly and adequately compensate plaintiff, Mercedel Miles, for her loss of support and services from the decedent? In

reaching this figure you are *not* to deduct any percentage or sum representing Ludwick Torregano's contributory negligence, as the Judge will make that reduction if required.

$7800

Proceed to Question No. 11.

11. If your answer to Question No. 2 or Question No. 4 is "Yes," is the plaintiff, Joseph Torregano, entitled to recover damages for his loss of services from the decedent?

Yes _____ No. ✔

If your answer is "yes," proceed to Question No. 12. If your answer is "No," skip Question No. 12 and proceed to Question No. 13.

12. What amount in dollars do you find would fairly and adequately compensate plaintiff, Joseph Torregano, for his loss of services from the decedent? In reaching this figure you are *not* to deduct any percentage or sum representing Ludwick Torregano's contributory negligence, as the Judge will make that reduction, if required.

$ NA

Proceed to Question No. 13.

13. Was the plaintiff, Mercedel Miles, financially dependent upon the decedent, Ludwick Torregano?

Yes _____ No ✔

If your answer is "Yes," proceed to Question No. 14. If your answer is "No," skip Questions No. 14 and No. 15

and return to the courtroom as your deliberations are finished.

14. If your answer to question No. 14 *and* Question No. 13 is "Yes," is the plaintiff, Mercedel Miles entitled to recover damages for her loss of society with the decedent?

Yes _____ No ✔

If your answer is "Yes", proceed to Question No. 15. If your answer is "No," skip Question No. 15 and return to the courtroom as your deliberations are finished.

15. What amount in dollars do you find would fairly and adequately compensate plaintiff, Mercedel Miles for her loss of society with the decedent? In reaching this figure you are *not* to deduct any percentage or sum representing Ludwick Torregano's contributory negligence as the Judge will make that deduction, if required.

$ NA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MERCEDEL W. MILES, ET AL — CIVIL ACTION NO. 85-4728

versus — SECTION B (3)

CLIFFORD A. MELROSE, ET AL

JUDGMENT

DATE OF ENTRY FEB 29 1988

This matter having come on for trial on Tuesday, January 19, 1988, and having been submitted to the jury on Friday, January 22, 1988, and in consideration of the jury's responses to the special interrogatories and, after a polling of the jury, in accordance with the jury's verdict on Saturday, January 23, 1988,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, Mercedel W. Miles, Individually and as Administratrix of the Succession of Ludwick Adam Torregano, and against the defendants, Apex Marine Corporation, Westchester Marine Shipping Company and Archon Marine Company under the Jones Act, finding defendants negligent in the death of Ludwick A. Torregano.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, Aeron Marine Company, and against the plaintiff, Mercedel W. Miles, Individually and as Administratrix of the Succession of Ludwick Adam Torregano, finding that the vessel M/V ARCHON was not unseaworthy at the time of the incident.

IT IS FURTHER ORDERED, ADjUDGED AND DECREED that there be judgment herein in favor of the plaintiff, Mercedel W. Miles, Individually and as Administratrix of the Succession of Ludwick Adam Torregano, and against the defendants, Apex Marine Corporation, Westchester Marine Shipping Company, and Archon Marine Company, in the amount of ONE HUNDRED FORTY-THOUSAND AND NO/100 ($140,000.00) DOLLARS for the pain and suffering of Ludwick A. Torregano prior to his death, to be reduced by 7%, or NINE THOUSAND EIGHT HUNDRED AND NO/100 ($9,800.00) DOLLARS, the amount of contributory negligence found on the part of the deceased, Ludwick A. Torregano, together with legal interest thereon from date of judgment until paid and all costs of these proceedings:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, Mercedel W. Miles, Individually and as Administratrix of the Succession of Ludwick Adam Torregano and against the defendants, Apex Marine Corporation, Westchester Marine Shipping Company and Archon Marine Company, in the amount of SEVEN THOUSAND, EIGHT HUNDRED AND NO/100 ($7,800.00) DOLLARS for Mercedel Miles' loss of support and services of the decedent, Ludwick A. Torregano, to be reduced by 7%, or FIVE HUNDRED FORTY-SIX AND NO/100 ($546.00) DOLLARS, the amount of contributory negligence found on the part of the deceased, Ludwick A. Torregano, together with legal interest thereon from date of judgment until paid and all costs of these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the

defendants, Apex Marine Corporation, Westchester Marine Shipping Company and Archon Marine Company and against the plaintiff, Mercedel W. Miles Individually and as Administratrix of the Succession of Ludwick Adam Torregano, denying thereto any claim for loss of society.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the defendants, Apex Marine Corporation, Westchester Marine Shipping Company and Archon Marine Company, and against the plaintiff, Mercedel W. Miles appearing on behalf of the decedent's father, Joseph Torregano, denying to Joseph Torregano any claim for loss of services.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in accordance with the order of this Court entered on September 9, 1987, dismissing the complaint of plaintiff and the third-party complaint of Apex Marine Corporation, and Westchester Marine Shipping Company, Inc. against the Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO, there be judgment herein in favor of the defendant, Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO, and against the plaintiff, Mercedel W. Miles, Individually and as Administratrix of the Succession of Ludwick Adam Torregano, and the defendants/third-party plaintiffs, Apex Marine Corporation, and Westchester Marine Shipping Company, Inc., each party to bear its own costs.

New Orleans, Louisiana, this 29th day of February, 1988.

Judge Frederick J.R. Heebe

No. 89-1158

In The

Supreme Court of the United States

October Term, 1989

MERCEDEL W. MILES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE SUCCESSION OF LUDWICK ADAM TORREGANO

Petitioner,

versus

APEX MARINE CORPORATION, WESTCHESTER MARINE SHIPPING COMPANY, INC., ARCHON MARINE COMPANY AND AERON MARINE COMPANY

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON THE MERITS ON BEHALF OF PETITIONER

ALLAIN F. HARDIN*
A. REMY FRANSEN, JR.
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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1) Whether an estate, under a general maritime survival action, is entitled to the decedent's future economic loss?

2) Whether the parents of a deceased seaman must establish financial dependency before asserting a claim for loss of society under the general maritime law?

PARTIES TO THE PROCEEDINGS

1) Mercedel W. Miles, Administratrix of the Succession of Ludwick A. Torregano (Claims on behalf of Mercedel W. Miles and Joseph Torregano, Sr.)

2) Apex Marine Corporation

3) Westchester Marine Shipping, Inc.

4) Archon Marine Company

5) Aeron Marine Company

6) Seafarers International Union, Atlantic, Gulf, Lakes, and Inland Waters District, AFL-CIO

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CITATION TO OPINION OF FIFTH CIRCUIT

The opinion of the Court of Appeals for the Fifth Circuit is reported at 882 F. 2d 976.

JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The judgment of a panel of the United States Court of Appeals for the Fifth Circuit was entered on September 11, 1989. A petition for rehearing was denied on October 11, 1989. A petition for a Writ of Certiorari was filed on January 8, 1990. Certiorari was granted on February 26, 1990.

STATEMENT OF THE CASE AND FACTS

On July 18, 1984, Ludwick A. Torregano, a seaman, was stabbed to death on board the vessel, M/V ARCHON, while it was moored in the Port of Vancouver, State of Washington. The decedent had been stabbed 62 times by a fellow crew member, Clifford A. Melrose. Mercedel W. Miles, mother of the decedent, and administratrix of his estate, brought an action against the vessel owner, charterer, and operator for negligence under the Jones Act, 46 U.S.C. § 688(a), and for unseaworthiness under the general maritime law. The perpetrator of the assault was also named as a defendant, but was not subject to the jurisdiction of the Federal District Court for the Eastern District of Louisiana. (A direct and third

party claim was made against the Union that provided the offending seaman to the vessel, Seafarers International Union, Atlantic, Gulf, Lakes, and Inland Waters District, AFL-CIO. These claims were dismissed by the lower court prior to trial.)

In the trial court the jury found for defendants on the unseaworthiness claim and for the mother on the Jones Act negligence claim. The mother was found by the jury *not* to be financially dependent upon her son. (J.A. 12) The claim of the father, Joseph Torregano, for his son's loss of society, was dismissed by the trial court on a directed verdict since there was no evidence that he was financially dependent upon his son. (J.A. 8 and 15-16). Neither was therefore entitled to loss of society damages. Finally, the trial court denied Miles' claim for the estate's economic loss despite the holding in *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987). (Record, Trial Transcript, Vol. III, pp. 304-306).

An appeal was taken and a decision rendered by the Court of Appeals, Fifth Circuit on September 11, 1989 holding the following:

(1) As a matter of law, given the viciousness of the attack, the offending crew member failed to measure up to the standard of his calling and thus rendered the vessel unseaworthy, *Boudoin v. Lykes Brothers Steamship Company*, 348 U.S. 336 (1955).

(2) The general maritime law does not permit a survival action for a decedent's future wage loss despite a direct contradictory holding of the Court of Appeals for the Ninth Circuit in *Evich*, supra.

(3) In a general maritime wrongful death action parents cannot recover damages for their son's loss of society even when he dies without a spouse or child, unless they can establish financial dependency.

The Court of Appeal also reversed the jury's finding that the decedent was 7% contributorily negligent and upheld the trial court's dismissal of petitioner's claim for punitive damages. (Finally, the trial court's dismissal of the claim against the union for allegedly failing to warn the ship owner of the crew member's violent propensities was reversed.)

The Fifth Circuit in its opinion was confronted with "two questions of first impression for this circuit concerning the proper scope of damages under the general maritime law. May the deceased's estate bring a survival action for the recovery of the victim's future economic loss? In a wrongful death action, may the nondependent parents of a deceased seaman, survived by neither spouse nor child, recover for loss of society?" *Miles v. Melrose*, 882 F.2d 976 at 985 (5th Cir. 1989). The Court answered "No" to both questions.

ESTATE'S CLAIM FOR ECONOMIC LOSS

The Fifth Circuit noted the distinction between a survival action and a wrongful death action. In a survival action, the estate or successors of a deceased person are allowed to prosecute a claim for personal injury that the deceased himself would have had but for his death. In a wrongful death action, the victim's dependents, not the victim, are allowed to recover for the harms they personally suffered as a result of the death, independent of any action the decedent may have had for his own personal injuries. 882 F.2d at 985. The court pointed out that the "Supreme Court has not yet recognized a cause of action

for survival benefits under general maritime law." 882 F.2d at 986. However, numerous circuit courts have established a general maritime law survival action claim for a victim's pre-death pain and suffering. 882 F.2d at 986, n. 30.

Petitioner as administratrix of the estate asserted at trial a survival action claim for the decedent's lost future income based upon *Evich v. Morris*, 819 F.2d 256 (9th Cir.), cert. denied, 484 U.S. 914 (1987). That case allowed the estate of a deceased seaman to bring a cause of action, when there are no dependents, for the decedent's lost future income.

In *Evich v. Connolly*, 759 F. 2d 1432 (9th Cir. 1985), (*Evich I*), the nondependent brothers of a deceased seaman brought suit as representative of their brother's estate under the Jones Act and the general maritime law. Both survival and wrongful death damages were sought.

The *Evich I* court held that the nondependent siblings had no cause of action under the Jones Act, 46 U.S.C. § 688(a). The statute by reference makes applicable the provisions of the Federal Employers Liability Act (FELA) 45 U.S.C. § 51 et seq. The persons allowed to claim damages under that section include "the surviving widow or husband and children of such employees; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee." 45 U.S.C. § 51. Since none of the brothers were dependent on the decedent they had no claim.

The *Evich I* court also rejected the siblings' claim for wrongful death under the general maritime law, as recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375

(1970). In the court's view they did not fall within the class of beneficiaries intended to benefit from that cause of action. The court analogized to the Death on the High Seas Act (DOHSA) 46 U.S.C. § 761. Pursuant to that statute an action may be brought only for the benefit of the decedent's "wife, husband, parent, child, or dependent relative." A sibling could bring an action only upon proof of dependency. *Evich v. Connolly*, 759 F.2d 1432 at 1433. Finally, the *Evich I* court held that the estate could maintain a survival action and remanded on that issue. 759 F.2d at 1434.

On remand the district court awarded survival damages only for the decedent's pain and suffering prior to death. In *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987) (*Evich II*) the court held that the decedent's estate should be compensated for loss of future earnings. The Court stated as follows:

> While the majority of states do not allow future economic loss to be recovered in survival actions, and the Jones Act provides for no such recovery, we find recovery here " 'better becomes the humane and liberal character of proceedings in admiralty' ", *Moragne* 398 U.S. at 387, 90 S.Ct. at 1780 (citation omitted), and prevents the anomaly of rewarding a petitioner for killing his victim rather than injuring him, see id. at 395, 90 S.Ct. at 1784. Most states and the Jones Act allow these damages to be recovered in the form of loss of support when wrongful death beneficiaries exist. Where, as here, those beneficiaries do not exist, potential problems with double recovery do not exist. Under these circumstances, the decedent's estate should be compensated for loss of future earnings. See

Kriesak v. Crowe, 36 F. Supp. 127, 129, (M.D. Pa. 1940).

Evich v. Morris, 819 F.2d at 258.

In the present case the father and mother are in the same situation as the brothers in *Evich II*, id. Neither was dependent upon their son. The trial Judge rejected the father's claim because there was absolutely no evidence of monetary benefit from the decedent and the jury rejected the mother's claim holding that any money or services given to the mother did not rise to the level of dependency. (J.A. 8 and 12).

The Fifth Circuit was "not persuaded that the reasons advanced in *Evich* support recognizing an additional basis for recovery." It felt that it was not licensed to create causes of action. (Though it did in the same opinion establish a cause of action against a union on a "failure to warn" theory.) Moreover, "*Moragne* did not recognize a maritime cause of action for wrongful death merely because it was humane to do so. Rather, it recognized the wrongful death action within the context of an almost universal rejection of the common law rule barring such actions." *Miles*, 882 F.2d 976 at 986.

The Fifth Circuit believed that the court in *Moragne* was strongly influenced by legislative acts that had created a cause of action for wrongful death. Quoting from *Moragne* the Fifth Circuit felt that the legislative policy established through the passage of wrongful death statutes has "become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law." *Miles*,

882 F.2d 976 at 987 citing *Moragne*, 398 U.S. at 390-91.

The Court went on to note that "most states survival statutes and the Jones Act do not allow recovery for lost wages" and that "DOHSA gives no action for any kind of survivorship benefit." 882 F.2d at 987. "Furthermore, since Jones Act survival claims do not extend to the decedent's lost wages, uniformity of maritime law is not served by allowing such an action under the general maritime law." 882 F.2d at 987.

The court held that a survival action for a decedent's lost future wages is not permitted under the general maritime law. 882 F.2d at 987.

LOSS OF SOCIETY CLAIMS OF NONDEPENDENT PARENTS

Mercedel W. Miles, as administratrix of the succession of the decedent, asserted a claim for loss of society damages on behalf of herself and Joseph Torregano, the decedent's father. The evidence at trial clearly established that the father did not receive any financial support from his son. None was needed by the father. (R., Tr. Vol. II., pp. 221-222). At the close of plaintiff's case the court granted the defense Motion to Strike the Claim of Joseph Torregano for loss of society since there was no financial dependency. (J.A. 8). The claim of the mother for loss of society damages was submitted to the jury. The jury found that Mrs. Miles was not dependent upon her son at the time of his death. (J.A. 12). It did award the sum of $7,800.00 under the Jones Act claim for loss of services and support. (J.A. 11-12).

Miles contended in the court of appeal that in a wrongful death action under the general maritime law the nondependent parents of a deceased seaman may recover for loss of society when there is no surviving spouse or child. The court, despite Miles's appeal as administratrix of the succession, held that Joseph Torregano had not filed a notice of appeal and that his claim was not before the court. *Miles v. Melrose,* 882 F. 2d at 987.

The court noted that in *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375 (1970) this Honorable Court recognized a claim for wrongful death under the general maritime law. In *Sea-Land Services, Inc. v. Gaudet,* 414 U. S. 573 (1974) this Honorable Court held that a surviving spouse had a claim for loss of society damages. Society was defined as that "broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. at 585.

The Fifth Circuit traced its own jurisprudence and noted that the issue raised "is one of first impression for this circuit." In *Sistrunk v. Circle Bar Drilling Company,* 770 F.2d 455 (5th Cir. 1985), cert. denied, 475 U.S. 1019 (1986), the court held that nondependent parents of seamen, who were killed in territorial waters and who were survived by spouses and/or children could not recover for loss of society. The court felt its decision was directed by the "twin aims of maritime law that informed the creation of the wrongful death action in *Moragne*: achieving

uniformity in the exercise of admiralty jurisdiction and providing special solicitude to seaman." 882 F.2d at 987.

The Fifth Circuit concluded first, that " 'denial of recovery lends more uniformity to admiralty jurisdiction than allowing recovery,' because the parents could not recover loss of society damages under either the DOHSA or the Jones Act" and secondly, that "providing for the special solicitude of seaman, would not be furthered in any meaningful way by allowing nondependent parents to recover for loss of society." 882 F.2d at 988. The court went on to explain that it could not provide the survivors of a seaman "peace of mind" because the admiralty jurisdiction made distinctions between deaths occurring on the high seas and in territorial waters and those deaths resulting from negligence as opposed to unseaworthiness. "Admiralty cannot provide the parents solicitude at a voyage's outset when their right to recover for loss of society is dependent on the fortuity that the deaths occur in territorial waters and are caused by unseaworthiness." 882 F.2d at 988, citing from *Sistrunk,* supra at 460. Moreover, since the parents were nondependents and the Jones Act and DOHSA do not allow for recovery of non-economic damages, "we do not contravene maritime law's aim of providing special solicitude to seaman by denying them recovery for loss of society." 882 F. 2d at 988.

It appears that the Court is saying that since there is a lack of consistency and non-uniformity in this area and because other recovery is limited, special solicitude cannot be provided.

The Fifth Circuit then made it clear that a policy decision must be made in order to establish a cut off point for those persons claiming damages for their loss of society as a result of a seaman's death. The Court believed that the Supreme Court had suggested a line in *Moragne* and *Gaudet*, "the line between dependents and nondependents." The Court felt that this line " 'appears to be the most rational, efficient, and fair.' *Truehart v. Blandon*, 672 F. Supp. 929, 938 (E.D. La. 1987). It creates a finite, determinable class of beneficiaries." 882 F. 2d at 989.

The Court realized that its decision "may seem unwarranted" in view of the fact that loss of society damages, a non financial loss, were being restricted to dependents alone. On the other hand the court was concerned with "the number of plaintiffs who could allege a loss of love and affection as a result of the death of a dearly beloved seaman – aunts and uncles, nieces and nephews, even friends and lovers – necessitates that we draw a line between those who may recover for loss of society and those who may not." 882 F. 2d at 989.

The Court apparently believed that allowing nondependent parents recovery for loss of their son's society would help create a "larger and more amorphous" class of plaintiffs. Accordingly, the Fifth Circuit held "that in a general maritime wrongful death action nondependant parents may not recover for loss of society whether or not their deceased children were survived by spouse or child." 882 F. 2d at 989.

Petitioner sought review of the Fifth Circuit's decision because she was denied rights granted to nondependents in the Ninth Circuit and because she believes the admiralty jurisdiction provides a mother and father a claim for loss of society without having to establish dependency.

SUMMARY OF ARGUMENT

I.

In *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987) cert. denied, 484 U.S. 914, the court was presented with the wrongful death of a seaman survived by nondependent siblings. Since neither the Jones Act, DOHSA, or the general maritime law would allow recovery under a wrongful death cause of action, the court recognized a survival cause of action for the estate's economic loss. The court believed that this was in line with "the humane and liberal character of proceedings in admiralty" and "prevents the anomaly of rewarding a [defendant] for killing his victim rather than injuring him". *Evich*, 819 F.2d at 258. The holding of the Fifth Circuit in the case at bar dispenses with any effective legal remedy for the wrongful death of a seaman, who is survived by nondependents. If death befalls the seaman instantaneously there is no recovery. By following *Evich*, a more humane remedy is made available. Petitioner respectfully submits that allowing an estate under a survival action to claim a decedent's economic loss is consistent with a number of state survival statutes and better serves the interest of seamen.

II.

In the case at bar, the Court of Appeals for the Fifth Circuit denied to parents of a deceased seaman any claim for loss of society damages because they were not financially dependent upon their son. The Jones Act and DOHSA, relied upon by this Honorable Court in recognizing a cause of action for wrongful death, do not require dependency on the part of parents before a claim can be asserted. Dependency applies only to "next of kin" (Jones Act) or "relatives" (DOHSA). Loss of society damages are not financially based and should not hinge upon a parents financial dependency, especially where there are no surviving minor children and/or spouse. To so hold is more in line with the humane and generous nature of the admiralty law.

ARGUMENT

I.

THE ESTATE'S CLAIM FOR LOSS OF FUTURE EARNINGS

The United States Court of Appeals for the Ninth Circuit has held that where dependents do not exist a "decedent's estate should be compensated for loss of future earnings." *Evich v. Morris*, 819 F.2d 256 at 258 (9th Cir. 1987), cert. denied, 484 U.S. 914 (1987). Mercedel Miles, as administratrix of the succession of her deceased son, sought survival action damages in the district court. The trial judge declined to follow the Ninth Circuit's holding in *Evich*, id., and dismissed the claim. (J.A. 8).

The Fifth Circuit on appeal concluded "that the general maritime law does not permit a survival action for the deceased's lost future wages." *Miles v. Melrose*, 882 F.2d 976 at 987 (5th Cir. 1989). Petitioner respectfully submits that the holding in *Evich* is in harmony with the humane and generous purposes of the general maritime law and should be followed.

The *Evich* decision must be considered within the context of the status afforded seamen in the admiralty courts. Seamen are declared to be the "wards of admiralty." *Robertson v. Baldwin*, 165 U.S. 275 (1897). They are provided "a special solicitude", *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) and when examining a cause of action it is better "to give than to withhold the remedy." *American Export Lines v. Alvez*, 446 U.S. 274, 281-82 (1980).

Equally significant to the Court in *Evich*, was the prevention of "the anomaly of rewarding" an employer "for killing his victim rather than injuring him." 819 F.2d at 258. The *Evich* court believed that the Supreme Court was attempting to do the same in *Moragne*, in overruling *The Harrisburg*, 119 U.S. 199 (1886). But see *Complaint of Cambria Steamship Company*, 505 F. 2d 517 (6th Cir. 1974) cert. denied, 420 U.S. 975.

The Harrisburg was a death without a remedy. In this case, had Torregano's death been immediate and less gruesome, there would have been a similar result. The same thing occurred in *Neal v. Barisich, Inc.*, 707 F.Supp. 862 (E.D. La. 1989). In that case a seaman was knocked overboard as a result of a collision between two vessels. Since the parents were not dependent, there was no claim

for loss of society. Since there was no evidence of pain and suffering prior to death, there were no damages. Finally, since there was no recognized claim for the estate's economic damages, there was no recovery. If this is the law, then the spirit of *The Harrisburg* survives, despite the stated purpose of *Moragne*.

As the law now stands in the Fifth Circuit, nondependent survivors of a seaman have no claim except for what pain and suffering can be shown prior to death. If death befalls such a seaman instantaneously, it is a legal nonevent.

The jurisprudence is not without precedent in allowing survival damages. First, admiralty courts recognize a claim for pain and suffering. "After *Moragne* . . . numerous decisions of [the Fifth] and other circuits have recognized that, under the principals announced in that decision, the general maritime law includes a survival action permitting recovery for the victim's pre-death pain and suffering." *Miles*, supra, 882 F.2d at 986, citing *Azzopardi v. Ocean Drilling and Exploration Company*, 742 F.2d 890, 893 (5th Cir. 1984); *Law v. Sea Drilling Corporation*, 523 F.2d 793, 795 (5th Cir. 1975); *Barbe v. Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974); *Spiller v. Lowe*, 466 F.2d 903, 909 (8th Cir. 1972). Most states provide for a survival cause of action for pre-death losses. *S. Speiser, Recovery for Wrongful Death*, 2d Ed. (1975), Vol. I., § 1:23 at p. 56. Additionally "[t]he Federal Employers' Liability Act, 45 U.S.C. § 59, and the Jones Act, 46 U.S.C. § 688, but not the Death on the High Seas Act, 46 U.S.C. § 761-768, contain survival provisions." *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 at 576, n.2 (1974).

The issue is not whether a survival action exists, but the extent to which damages are allowed. The question here is whether future economic losses of a decedent's estate are a recoverable element of damages under the general maritime law. The *Evich* holding in this regard does not stand alone. State survival statutes and the maritime law also have allowed such damages.

In *Muirhead v. Pacific Inland Navigation, Inc.*, 378 F.Supp. 361 (W.D. Wash. 1974) the court allowed recovery for an estate's future economic loss. It felt that such a holding was consistent with *Moragne*, supra, and *Gaudet*, supra, and the Washington State Survival Statute, R.C.W. 4.20.046. The Court recognized such a cause of action in the general maritime law and awarded $10,000.00. Interestingly, Torregano met his death in the State of Washington. See also, *Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971) and *United States v. Texas Co.*, 272 F.2d 711 (4th Cir. 1959), applying state survival statutes.

In *Evich* the court acknowledged that an estate's economic losses were not generally recoverable under state survival statutes. A review of *Speiser, Recovery for Wrongful Death*, 2d Ed. (1975) would reflect that a determination of the exact number of states that allow such a recovery is not easily derived. There is no uniformity in wrongful death or survival statutes. *Speiser*, § 15.1, p. 459. For example, some states provide that damages are to be awarded to certain beneficiaries for their pecuniary loss. However, in those states, if there are no designated beneficiaries then the estate has a claim for its economic losses. See *Speiser*, § 3:1, p. 104, n.4. No doubt the concern of the authors of such legislation is with circumstances where the decedent is survived by nondependents. Such

a statute "prevents the anomaly" referred to in *Evich*. 819 F.2d at 258.

In the Fifth Circuit the defendants argued that allowing an estate to recover its economic losses would result in a double recovery. A particular concern was the fact that Mrs. Miles recovered $7,800.00 for loss of support and services under the Jones Act. A simple offset would be the appropriate method of dealing with this supposed problem. See *Speiser*, supra, § 14:2, p. 411. See also *Gaudet*, 414 U. S. 573 at 593-596, where the Court was faced with previously awarded loss of future income.

Methods of determining the economic loss to an estate vary. According to *Speiser*, supra, the "most prevalent theory is that the damages should represent the present value of the decedent's probable future net earnings. In other words, the recovery should equal the decedent's probable future earnings, diminished by the amount he would have spent for his own living expenses had he survived, and reduced to present value." *Speiser*, supra, § 3:2, p. 122. Additional methods include measuring the damages "by the present worth of decedent's probable gross earnings" and "by the present worth of decedent's probable future accumulations." *Speiser*, supra, § 3:2, pp. 122-126. Regardless of the measure of damages, it is respectfully submitted that states with such survival statutes take a more humane and generous view in situations where the decedent dies without dependents and/or beneficiaries. A wrongful death without a remedy is simply not allowed to occur.

Judge Rubin of the Fifth Circuit believed that courts were not licensed "to create causes of action whenever

they see fit." 882 F. 2d 976 at 986. Yet, in the same opinion that court recognized for the first time a "failure to warn" cause of action by a shipowner against a union. 882 F.2d 976 at 991-992. Moreover, it is unfair to say the Ninth Circuit has "created" a cause of action when so many jurisdictions provide for it. See *Speiser*, supra, § 3:1, p. 104-107, n. 4 reference to the statutes of the states of Alaska, Delaware, Indiana, Pennsylvania, Arizona, Florida, Georgia, Mississippi, and New Mexico.

Judge Rubin's view that "[t]he recognition of an estate's survival action for lost wages would stand alone", 882 F.2d at 987, is not entirely correct, considering the states that do in fact provide for this element of damages. A similar result in the case at bar would seem consistent with the "solicitude" and the giving of the "remedy" contemplated in *Moragne*. Moreover, any concern with uniformity in the admiralty law is addressed by providing for this recovery only in cases where there are no dependent beneficiaries.

Petitioner respectfully submits that survival actions do exist that provide for economic damages to an estate, especially in those cases where the decedent dies without dependents. Given the humane and generous character of the admiralty law, such damages should be allowed.

II.

PARENT'S CLAIM FOR LOSS OF SOCIETY DAMAGES

This Honorable Court unanimously held in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) "that an

action does lie under general maritime law for death caused by violation of maritime duties." id. at 410. The Court believed that the rule of *The Harrisburg*, 119 U.S. 199 (1886), denying a remedy for wrongful death under the general maritime law, had to be overruled in view of the outdated common law principals upon which *The Harrisburg* was based, the universal existence of wrongful-death statutes, *Moragne*, supra at 390-391, and the promotion of uniformity in the maritime law, *Moragne*, supra at 402.

The *Moragne* court recognized that elements of this cause of action would have to be addressed in subsequent decisions. This included the "determination of the beneficiaries who are entitled to recover" and "questions of the measure of damages." id. at 407. The parties before the Court suggested the Death on the High Seas Act, 46 U.S.C. § 761, § 762, the Jones Act, 46 U.S.C. § 688 (see 45 U.S.C. § 51) and the Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. § 909 as guides. The Court chose not to "determine this issue now, for we think its final resolution should await further sifting through the lower courts in future litigation." These issues were "grist for the judicial mill." *Moragne*, supra at 409.

In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) this Honorable Court recognized under the general maritime law a claim for loss of society, that "broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." id at 586.

Historically the Court noted that many "early wrongful-death statutes were interpreted by courts to preclude recovery for loss of society damages" and limited recovery to "pecuniary loss." id. at 587. "A clear majority of states, on the other hand, have rejected such a narrow view of damages, and, either by expressed statutory provision or by judicial construction, permit recovery for loss of society." The Court further referenced the statement of *Speiser*, supra, that "the recent trend is unmistakably in favor of permitting such recovery." id. at 588, *S. Speiser, Recovery for Wrongful Death* (1966). Finally, the Court felt its decision was "compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." id. at 589.

The claimants before the court in both *Moragne*, supra, and *Gaudet*, supra, were the wives of deceased longshoremen. Both were obviously dependent upon their husbands. The court referred to these claimants as "dependents." For example, in *Gaudet*, the Court stated: "Unquestionably, the deprivation of [loss of society] by wrongful death is a grave loss to the decedent's dependents." id. at 586-587.

In deciding upon the class of beneficiaries entitled to loss of society damages some courts have taken the use of the term "dependents" as a directive by this Honorable Court to limit those damages to a decedent's financial dependents. This literal interpretation was made despite the specific holding that the issue required "further sifting" through the lower courts. *Moragne*, supra at 409. The

Fifth Circuit in *Miles* was of the belief that the Supreme Court in *Moragne* and *Gaudet* had suggested "the line between dependents and nondependents." *Miles v. Melrose,* 882 F.2d 976 at 989 (5th Cir. 1989). See also *Sistrunk v. Circle Bar Drilling Company,* 770 F.2d 455 (5th Cir. 1985), cert. denied, 475 U.S. 1019 (1986) *Complaint of DFDS Seaways (Bahamas Ltd.),* 684 F. Supp. 1160 (S.D.N.Y. 1987), *Truehart v. Blandon,* 672 F.Supp. 929, 938 (E.D.La. 1987), and *Neal v. Barisich, Inc.,* 707 F. Supp. 862, (E.D. La. 1989).

In *Sistrunk,* supra, a case relied upon in *Miles,* the court was faced with the claims of parents of a decedent who was survived by a spouse and/or children. In *Sistrunk,* the court believed that uniformity could not be obtained because the parents in that case had no cause of action under the Jones Act and no recovery under DOHSA, because of non dependency and this court's holding in *Mobile Oil Corporation v. Higginbotham,* 436 U.S. 618 (1978). See also, *Complaint of DFDS Seaways,* 684 F.Supp. 1160 (S.D.N.Y. 1987). Nor could special solicitude be provided to the seaman because the parents were not financial dependents and because recovery "for loss of society is dependent on the fortuity that the deaths occur in territorial waters and are caused by unseaworthiness." 770 F.2d at 460. Finally, the court in *Sistrunk* looked to state wrongful death statutes and found that "the vast majority of states do not provide parents *similarly situated* to those in this case the right to recover for loss of society." 770 F.2d at 460 (emphasis supplied). Practically every state statute referenced denied loss of society damages to parents when the decedent was survived by a spouse and/or children. 770 F.2d at 460, see n. 5.

It is respectfully submitted that the Courts in *Sistrunk* and *Miles* were seeking "consistency" of remedies and not "uniformity"; something impossible to achieve in admiralty given the distinction between the damages and beneficiaries under DOHSA and the Jones Act and the damages under general maritime law. Moreover, the problem in *Sistrunk* was with priority and ranking. A child and/or spouse has preference over a parent in a wrongful death claim for loss of society damages. State legislatures have drawn a line at that point. In the case at bar, the decedent was not survived by a spouse or child. In *Truehart,* supra, and *Neal,* supra, as well as in the instant case, the court was presented with a decedent survived by parents alone. There is no issue of priority or ranking or the number of persons seeking damages in *Miles.*

Judge Alvin B. Rubin in *Miles* stated that denying nondependent parents loss of society damages was appropriate because it was more in line with the twin aims of maritime law. The Court believed that "denial of recovery lends more uniformity to admiralty jurisdiction than allowing recovery" and the provision of "special solicitude of a seaman, would not be furthered in any meaningful way by allowing nondependent parents to recover for loss of society." *Miles,* 882 at 988, citing *Sistrunk v. Circle Bar Drilling Company,* 770 F.2d 455 (5th Cir. 1985), cert. denied, 475 U.S. 1019 (1986).

Interestingly, when Judge Rubin was faced with this exact issue when he was a district court judge he held otherwise. In *Hamilton v. Canal Barge Company, Inc.,* 395 F.

Supp. 978 (E.D. La. 1975) the court was presented with the claims of a posthumous child, nondependent parents and decedent's intended wife. The child and parents were allowed recovery. Judge Rubin in analyzing *Moragne* and *Gaudet*, stated as follows:

> In *Gaudet*, the court said, "the decedent's *dependents* may recover damages for their loss of support, services, and society," 94 S.Ct.at 814 (emphasis supplied), making no mention of the right of nondependent relatives to recover. Under neither the Jones Act nor DOHSA, however, is dependency required by a parent to recover. *In re Risdal & Anderson*, D. Mass. 1968, 291 F.Supp. 353. This is the clear intent of both statutes, which, in listing beneficiaries, modify only "relatives" (DOHSA) or "next of kin" (Jones Act) with the adjective "dependent." Dependency is not a prerequisite to recovery by parents in Louisiana, La. Civ. Code Art. 2315, nor in most other states. W. Prosser, Law of Torts § 127 (4th Ed. 1970). It would therefore seem untoward to read a dependency requirement into the *Moragne* action for wrongful death.

Judge Rubin there recognized that when Congress established a line at "dependency" in wrongful death statutes it did so *after* parents. He also recognized that the use of the term "dependents" was not controlling. More importantly it was not a prerequisite for recovery in "most . . . states." This is the same backdrop that Judge Rubin recognized had compelled the Supreme Court to create a wrongful death cause of action – the already existing federal and state statutes. This legislative policy is "a part of our law, to be given its appropriate weight" in the Court's decision. *Miles*, 882 F.2d 976, 987. Yet recovery was denied by the Fifth Circuit in *Miles*.

Judge Rubin in *Miles* also made the point that "special solicitude" could not be provided because distinctions are made in admiralty law in death cases between those occurring on the high seas and territorial waters and deaths resulting from negligence as opposed to unseaworthiness. Petitioner respectfully suggests that the "special solicitude" requirement should not be abandoned merely because different remedies apply under different circumstances. Moreover, the court's statement that "denial of recovery lends more uniformity . . . because the parents could not recover loss of society damages under either the DOHSA or the Jones Act", 882 F.2d at 988, is inapposite, because a wife and/or minor child can not recover such damages under those Acts either.

It is respectfully submitted that the aim of achieving uniformity is directed to making one body of law applicable throughout the United States. It would be futile to seek consistency in this area given the non-existence of a loss of society claim on the high seas, *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 and the judicial limitation of the Jones Act to pecuniary damages, *Michigan Central Railroad v. Vreeland*, 277 U.S. 59 (1913). The difference between actions arising on territorial waters and on the high seas and under the Jones Act and under general maritime law are based upon the historical development of the law. In a sense, they are inconsistencies "coextensive with, and operating uniformly in the whole country." *The Lottawanna*, 21 Wall. 558, 575 (1875).

In *Miles*, Judge Rubin, as organ for the court, believed that allowing recovery to non dependent parents

would assist in creating a "larger and more amorphous" class of beneficiaries.

> The number of plaintiffs who could allege a loss of love and affection as a result of the death of a dearly beloved seaman – aunts and uncles, nieces and nephews, even friends and lovers – necessitates that we draw a line between those who may recover for loss of society and those who may not. The line suggested by the Supreme Court in *Moragne* and *Gaudet*, and by our own court in *Sistrunk*, the line between dependents and nondependents, 'appears to be the most rational, efficient and fair." *Truehart v. Blandon*, 672 F. Supp. 929, 938 (E.D. La. 1987). It creates a finite, determinable class of beneficiaries.

Miles v. Melrose, 882 F. 2d at 988-989.

In the Ninth Circuit the question of "dependency" and loss of society is apparently not an issue. In *Cook v. Ross Island Sand and Gravel Company*, 626 F.2d 746 (9th Cir. 1980) the court had before it a claim for the death of a seaman who was survived by a mother and other family members. The jury awarded damages for the decedent's pain and suffering prior to death and for "deprivation of (decedent's) comfort, care, aid and society" (i.e. loss of society). The jury awarded nothing for the loss of support to the decedent's mother. This was of no concern to the reviewing court. "Based on the allegation of unseaworthiness, plaintiff was entitled to recover damages for the loss of the decedent's society, pursuant to the principals of general maritime law set forth in *Moragne* and *Gaudet*." 626 F.2d 746 at 753. Moreover, other district courts have allowed this element of damages post *Moragne* and *Gaudet*. See *Thompson v. Offshore Company*, 440 F.Supp.

752 (S.D. Tex. 1977), where the court felt that "it would be inappropriate to conclusively presume that only the financially dependent suffer a loss of society." 440 F.Supp. at 765. See also *Complaint of Metcalf*, 530 F.Supp. 446 (S.D. Tex. 1981) where the court held that a decedent's mother suffered a loss of society regardless of dependency. 530 F.Supp. at 461. In *Palmer v. Ribax, Inc.*, 407 F.Supp. 974 (M.D. Fla. 1976) the court was of the belief that each family member had a claim for loss of society and that non-dependents should not be foreclosed from recovery. 407 F.Supp. at 979. See also *Hamilton v. Canal Barge Company, Inc.*, 395 F.Supp. 978 (E.D. La. 1975).

Even the Fifth Circuit in *Skidmore v. Grueninger*, 506 F.2d 716 (5th Cir. 1975), post *Gaudet*, held that "*survivors* in a maritime wrongful death action may be allowed recovery for loss of support, services, society and funeral expenses." 506 F.2d at 728. (emphasis supplied). The decedent in *Skidmore* was survived by a spouse, minor children, and an adult daughter. There was no mention whatsoever with the latter's dependency. "In permitting this recovery we recognize that an adult offspring is within the class of plaintiffs intended to be vindicated in maritime wrongful death actions." 506 F.2d at 728, n. 11. But see, *Miles*, 882 F.2d at 987 and *Neal v. Barisich, Inc.*, 707 F.Supp. 862 (E.D. La. 1989).

Utilizing dependency to control who can and cannot recover damages for loss of society creates its own inherent problems and injustices. In *Wade v. Rogala*, 270 F.2d 280 (3rd Cir. 1959), a Jones Act claim on behalf of a surviving father, the court believed that "it is only necessary to establish that [the father] had a reasonable expectation of pecuniary benefit from the continued life of his

son" in order to maintain a claim for pecuniary damages. In *Matter of P & E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989) the court referred to the Longshore and Harbor Workers' Compensation Act which provides that dependency is established "[w]here the contributions are made for the purpose and have the result of maintaining or helping to maintain the dependent in his customary standard of living." 872 F.2d at 649. More than likely, courts will utilize various definitions of dependency. It can range from an expected dependency in the future to present financial assistance to true financial dependency at the time of death.

A dependency criteria would also expand and open up the number of persons who could make a claim. For example, *In Complaint of Patton-Tully Transportation Company*, 797 F.2d 206 (5th Cir. 1986) the lower court awarded damages to a surviving mother and brothers and sisters of the decedent. The court held that "all dependents" may recover such damages. Since the decedent contributed to the family household his siblings were entitled to loss of society damages. Depending on its holding, this Honorable Court may find it necessary to address the issue of whether or not the ranking of beneficiaries is necessary. See ranking under Jones Act, 46 U.S.C. § 688(a), applying FELA, 45 U.S.C. § 51, as to non-ranking under DOHSA, 46 U.S.C. § 761.

In *Miles* the court was concerned with "the number of plaintiffs who could allege a loss of love and affection as a result of the death of a dearly beloved seaman – aunts and uncles, nieces and nephews, even friends and lovers . . . " 882 F.2d at 989. As the law now stands should

any of a decedent's aunts and uncles, nieces and nephews, and even friends and lovers be dependent upon that person at the time of death they would have a claim for loss of society damages. In contrast, parents who do not require and in fact may reject financial support from their child are denied this most basic and appropriate element of damages as for wrongful death.

When considering the proof required to establish financial dependency as compared to establishing a blood or adoptive relationship between a parent and child, the latter is obviously easier for a jury to comprehend and understand and is not subject to speculation or interpretation. There is no need for a jury to examine a check book in order to understand a parent/child relationship. Cases may differ as to the quality and constancy of that relationship, but certainly not the reality of its existence.

The holding in *Miles* is of little consequence to a decedent's wife or child. It is of great significance to parents and adult children, who are usually not dependent upon the decedent. In cases of short term suffering before death, or in instantaneous death, the result is a significant loss without a remedy. See *Neal v. Barisich, Inc.* 707 F.Supp. 862 (E.D. La. 1989). For all practical purposes, petitioner's recovery in this case was based solely upon the gruesome nature of her son's death. Maritime death claims do not normally occur in such a fashion, and but for that happenstance, the case at hand would also have had no remedy.

Loss of society damages are not financially based. It should therefore not be subject to a financial determinative when dealing with so basic a relationship as parent

to child. Petitioner is not before this Honorable Court asserting damages for aunts, uncles, friends or lovers. It is not suggested that all familiar persons are entitled to this element of damages. Petitioner simply asserts that in this case the loss is real and measurable, and should be recognized. Proper limits can be imposed as later cases "sift" through the courts.

In the end, a line must be drawn. The most reasonable line is the one drawn by Congress in the Jones Act, and in DOHSA, which do not require parents to show financial dependency. If there must be a line of dependency, then it should be drawn *after* parents and not before.

The Death on the High Seas Act states in pertinent part as follows, 46 U.S.C. § 761: "the personal representative of the decedent may maintain a suit for damages . . . for the exclusive benefit of the decedent's wife, husband, parent, child, or *dependent* relative against the vessel, person, or corporation which would have been liable if death had not ensued." The Jones Act, 46 U.S.C. § 688 (a) applying 45 U.S.C. § 51 (FELA): "every common carrier . . . shall be liable in damages . . . in case of the death of such employee to his or her personal representative, for the benefit of the surviving widow or husband and children of such employees; and, if none, then of such employee's parents; and, if none, then of the next of kin *dependent* upon such employee." (emphasis supplied) (See Appendix for full text.)

A subsidiary issue that petitioner respectfully submits this court should address is the statement of the Fifth Circuit that the father, Joseph Torregano, was not

before the court because he did not appeal in his individual capacity. The issue is whether or not it is necessary for him to do so, given the fact that the representative of the succession asserted a claim on his behalf at trial. In *Futch v. Midland Enterprises, Inc.*, 471 F.2d 1195 (5th Cir. 1973), the court held that consistent with DOHSA, the Jones Act, and the Longshoreman and Harbor Workers' Compensation Act, "the personal representative or legal representative of the decedent" is the proper party to bring the wrongful death action under the general maritime law. The law would take a strange twist if each claimant had to file a separate appeal, despite the fact that they could not file an original claim in the lower court.

CONCLUSION

Petitioner respectfully prays that the decision of the Court of Appeal for the Fifth Circuit denying the claim for the estate's economic damages and denying the damage claims of the parents for loss of society be reversed, and that the case be remanded for further proceedings consistent with the directives of this Honorable Court.

Respectfully submitted,

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APPENDIX

46 U.S.C. § 761 et. seq.

DEATH ON HIGH SEAS BY WRONGFUL ACT

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. § 688

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees

shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

45. U.S.C. § 51 et seq.

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

* * *

§ 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

from in front of "next of kin" to in front of "wife, husband, parent, child" in DOHSA, 46 U.S.C. §761 and from in front of "relatives" in FELA to in front of "surviving widow or husband and children . . . ; and, if none, then of such employee's parents . . . " 45 U.S.C. §51 (Jones Act, 46 U.S.C. §688(a).

The shipowner for it's position can only refer to how many times this Court used the term "dependents." It cannot state that this Court made that specific determination and ignores the dissent in *Gaudet* which recognized that "the Court has still not resolved . . . how to define the class of beneficiaries . . . " *Gaudet*, 414 U.S., at 602.

While petitioner has no statistics on this point, it is obvious that many seamen are young and unmarried. Death of these individuals in many cases will result in no damages. *Neal v. Barisich, Inc.*, 707 F. Supp. 862 (E.D. La. 1989). This chilling result is not limited to seamen, since the same principles would apply to the death of a bright college student or young professional in a pleasure boating accident. *Truehart v. Blandon*, 672 F. Supp. 929 (E.D. La. 1987). The spirit of the general maritime law is not so harsh.

3) Uniformity and Special Solicitude to Seamen Would Not be Served by Limiting Recovery of Loss of Society Damages Solely to Dependents.

It is the parents in this case who are seeking consistency by utilizing the same beneficiaries set out in DOHSA and the Jones Act as the beneficiaries who should be entitled to loss of society damages under *Gaudet*. Such a holding would result in a consistency of beneficiaries between a general maritime law wrongful death claim within territorial waters and under the Jones Act. Damages would not be consistent given the difference in damages allowed under the different statutory schemes involved in death cases.

The shipowner relies upon the lower court's proposition "that 'denial of recovery lends more uniformity to admiralty jurisdiction than allowing recovery,' because the parent could not recover loss-of-society damages under either the DOHSA or the Jones Act." *Miles*, 882 F.2d at 988. The reliance is inappropriate. Neither can wives, husbands, or children recover non-pecuniary damages under those statutes. Moreover, the Fifth Circuit in *Dennis v. Central Gulf Steamship Corp.*, 453 F.2d 137 (5th Cir. 1972) at 140, addressed the issue of "uniformity" in the admiralty law when it stated:

> The 'uniformity' that is fundamental in maritime law has to do with the bases of liability, not with differing elements of damages that may be recoverable in differing circumstances with differing classes of beneficiaries.

Respondents also contend that "special solicitude" cannot be shown to deceased seamen by allowing their parents to recover loss of society damages. Special solicitude is shown by allowing those seamen who pay the ultimate price of their employment a right of recovery for the actual damages sustained by those close to them, here parents. Even *Vreeland*, which limited a railroad worker's recovery to monetary damages, recognized that loss of society damages were real. *Vreeland*, 227 U.S., at 71. See also *Gaudet*, 414 U.S., at 585-590 and 587 n. 21.

Respondent contends that the line drawn between dependents and non-dependents "appears to be the most rational, efficient and fair" [citing *Truehart v. Blandon*, supra]. It creates a finite, determinable, class of beneficiaries." *Miles*, 882 F.2d, at 988-989. Petitioner submits that it is not the most rational, efficient and fair method of drawing a line. A blood or adoptive relationship of a parent to child is exceedingly more understood by a jury of laymen than an analysis of financial contributions to persons who may or may not be related. These damages

should not turn upon check book entries. Loss of society speaks directly to the relationship of a parent to a child. The loss is real and palpable. Parents should not be relegated to an inferior status because no or not enough money exchanged hands. Such an inquiry may be appropriate for the "next of kin," it certainly is not one that should control when it comes to parents.

CONCLUSION

Petitioner respectfully submits that the Jones Act did not statutorily preempt for seamen the general maritime law death remedies and damages recognized by this Honorable Court. Further, it would be appropriate under the circumstances to recognize a general maritime survival action claim for the economic losses of the decedent's estate, given the fact that no one was dependent upon the decedent at the time of his death. Finally, petitioner prays that loss of society damages should be allowed for non-dependent parents in view of the classes of beneficiaries set forth in the Federal Employers Liability Act, 45 U.S.C. §51 (Jones Act, 46 U.S.C. §688(a)) and the Death on the High Seas Act, 46 U.S.C. §761.

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